LAW OF
DEFAMATION
AND
MALICIOUS PROSECUTON

BY

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PREFACE TO THE SECOND EDITION

A new edition of the book was long overdue but various factors stood in the way of the author undertaking the task at the appropriate time. It has now been possible, with the help of the energetic publishers, to bring out the present edition.

In this edition the book, in both its sections, has been thoroughly revised, in many respects recast and largely rewritten. In fact the section on Defamation is practically a new and improved treatise in all respects ; several chapters have been revised beyond recognition, references to English cases have been more numerous, and the arrangements have been recast so as to ensure a better connected reading and thereby a clearer understanding of the subject dealt with. All Indian cases and important English cases reported up to the time of printing have been included.

In quoting more copiously from English precedents, I have with a melancholy pleasure adopted the suggestion of my esteemed friend and colleague, the late Mr. Beharilal Gupta, Advocate, Howrah, whom alas death has taken away prematurely when many of his age are still left in the land of the living, quite hale and doing their bit.

The section on Malicious Prosecution likewise has been thoroughly revised and the arrangements have been improved upon wherever considered desirable. All cases bearing on the subject and reported up to the time of printing have similarly been included.

CALCUTTA :
May 31, 1948.

D. N. GUHA

This book is not a complete treatise on torts, but deals, as its title indicates, with two special classes of torts, namely, libel and malicious prosecution. An explanation for this special treatment involves a reference to the origin of the idea. When the first part of my Civil Procedure Code was published, it was universally welcomed as a unique publication, except for one provincial law report which came out with a very unfair comment for which there was no justification whatsoever. As the comment would not be retracted, on the other hand more venom was poured into it, I had no alternative left but to bring an action for libel against the offending journal. It subsequently terminated in a compromise through the intervention of well meaning friends. In that connection I made a thorough study of the law of libel, specially, as the case proceeded, I found that even lawyers of repute carried about them incorrect notions about the law of libel ; for instance, it would not be readily accepted that in a case of fair comment 'intention' or 'good faith' or 'honest mistake' has no place and if the facts are not correctly stated and the defendant cannot show that his comments contain no misstatements of fact, he cannot prove a defence of fair comment. This is due to the fact that cases of defamation are so few in this country, not because our people are more decent than those in the west, but because of the sense of resignation which permeates the country and which makes for the want of that keenness for the upholding of civil rights which characterises the people in the west. It has not been

possible for this dearth of Indian cases to illustrate al the aspects of the law of libel with Indian cases as hac been my plan and I have consequently filled in the gap: by drawing from English precedents quoted in standarc English books, and I take this opportunity of expressing my grateful acknowledgment for that. Not a single Indian case, whether reported in the authorised or unauthorised reports, has been omitted and no pains have been spared to make it as full and comprehensive a treatise on the law of libel as possible, and at the same time, concise and clear.

To make the book more useful 'Malicious Prosecution' has been added. Cases of damages for malicious prosecution are refreshingly numerous and it has been possible to deal with the subject entirely with reference to Indian cases, except only in two instances for which no Indian precedent could be found out. This, it is submitted, likewise tries to give the whole law on the subject of damages for malicious prosecution.

DHIRENDRA NATH GUHA

ABBREVIATIONS EXPLAINED

47 A	=	Indian Law Reports 47 Allahabad (old citation)
1943 B	=	„ „ „ (1943) Bombay (new citation)
(1943) 1 C (1943) 2 C	=	„ „ „ Calcutta series (issued in two volumes in the year)
Kar	=	Karachi (Sindh)
L	=	Lahore
Luck	=	Lucknow (Oudh)
M	=	Madras
N	=	Nagpur
O	=	Oudh
P or Pat	=	Patna
Pesh	=	Peshwar (N.W.F.P.)
R or Rang	=	Rangoon
S	=	Sindh
F or F.C.	=	Federal Court
P.C	=	Privy Council
I.A	=	Indian Appeals (P.C)
I.C	=	Indian Cases
A.I.R	=	All India Reporter
B.R	=	Bihar Reports (Patna)
Mys,	=	Mysore
A.M	=	Ajmer-Marwara
J & K	=	Jammu and Kashmir
F.B	=	Full Bench
Rev.	=	Revenue
R.D	=	Revenue Decisions (Allahabad)
Ibid	=	Same as immediately above
Supra	=	Same as mentioned before
Infra	=	Same as mentioned below
: (colon)	=	Same case

DEFAMATION

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CHAPTER I.

GENERAL PRINCIPLES.

Every person has the right to have his reputation in tact and unsullied by anything said or done by another. This right to reputation is a valuable personal right. One who violates this right, wantonly, without any justification, and thereby injures the reputation of another commits an actionable wrong. This wrong is called *Defamation*. Actionable wrong means an injury for which an action (suit) will lie in Court. The injury is compensated by award of damages.

Right of reputation.

Defamation.

Actionable wrong.

The right is violated when a statement is made or uttered which is injurious to reputation. The statement is called a defamatory statement. The wrong of defamation thus consists in the publication of a false and defamatory statement respecting another person without lawful justification.

Violation of right of reputation.

The wrong of defamation.

A *defamatory statement* is one which has a tendency to injure the reputation of the person to whom it refers, that is, to lower him in the estimation of others, or to bring him in obloquy, contempt or ridicule, or to injure him in his profession or trade ; in other words, which tends to

Defamatory statement.

diminish the good opinion that other persons have of him, and to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem (1). A person thus has a right to complain of a defamatory statement when it exposes him to contempt, hatred, ridicule, or obloquy, or tends to injure him in his profession or trade, or causes him to be shunned or avoided by his neighbours (2).

Libel and Slander.

The wrong of defamation may be committed either by writing or its equivalent, or by speech. The wrong is accordingly of two kinds. When by writing, it is called '*libel*', when by speech it is called '*slander*'. Libel is written, and slander is spoken defamation. In libel the defamatory statement is made in some permanent visible form, such as writing, printing, pictures or effigies. In slander it is made in spoken words or in some other transitory form whether visible or audible, such as gestures, hissing, or other inarticulate but significant sounds (3). That is, defamation when by

(1) (1840) 6 M & W p. 108 : 55 R. R p. 532, (1882) 7 A. C. p. 771, (1894) 1 Q. B 133 at p. 138, 26 C 653 F. B infra, 32 C 1060 infra. A statement is not defamatory merely because it excites hatred, contempt, ridicule, or other adverse feelings in some particular class of the community whose standard of opinion is such that law cannot approve of it or notice it. It is the estimation in which a man is held by society generally which is the criterion, (1869) Ir. Rep. 4 C. L. 54 at p. 62. See also (1863) 8 L. T (N. S) 397, (1874) L. R 9 C. P 118. The injury on the face of it must flow from the wrongful action; if it does not, it has to be explained how the matter complained of has caused the injury, 28 N. L. R 320.

(2) See (1827) 130 E. R 743, (1882) 7 A. C 741 at p. 771, (1860) 175 E. R 1000 : 121 R. R 783, 9 A. L. J 253 : 13 I. C 506, 47 A 391 : 23 A. L. J 151 : 86 I. C 922 A.I.R : 1925 A 371.

(3) (1894) 1 Q. B 671, at p. 692, per Lopes L. J.

spoken words or signs, which being transient is slander, and when by writing or its equivalent which being relatively permanent is libel. So in libel which is written defamation, the injury for that reason is relatively permanent and in slander, which is oral or spoken defamation, the injury for that reason is transient.

Gramophone record. Talking film.

If a defamatory matter is recorded in a gramophone record or in a talking film, it is a slander and not libel, for the defamation is by words which is heard only. The words are impressed in the record which is undoubtedly permanent but no one can see and read it as a writing and whether at the time of impressing the record and afterwards when the record is played the words are heard only. It is therefore defamation by spoken words at every stage and no libel. This is strictly according to the distinction between libel and slander. It would appear however that although only spoken words are heard, the record or the film perpetuates it and one who has the knowledge may play the record and reproduce the defamatory matter as freely and as often as if it were contained in a written form as in a book and so it should rather amount to libel. In broadcasting there is no such permanent record but only spoken words and so it would be slander to broadcast defamatory matter. That it is broadcast over a large area would not make any difference, in the same way as verbal abuse which even if made in a

Broadcasting

public place and in the presence of a crowd of persons would not make it a libel but would remain a slander all the same, being by spoken words and so transitory.

English law.

In English law there are two other important differences between libel and slander ; namely,—

(a) Libel is not merely an actionable tort but also a criminal offence ; whereas slander is a civil injury only, and is not a criminal offence, except where it is blasphemous, seditious, obscene or amounts to a contempt of court, or a solicitation to commit a crime (1).

(b) Libel is in all cases actionable per se ; but slander is, save in special cases, actionable only on proof of special i.e., actual damage.

Libel actionable per se.

Libel is in all cases actionable per se i.e. by itself, so that a person complaining of a libel is not to prove as part of his cause of action that he has actually suffered damage as a result of the libel. Once the libel is proved, the law presumes damage and the court awards such compensation as it considers fit (2). But slander is not actionable per se, but is actionable only on proof of special damage. That is, the plaintiff in a case of slander or oral defamation

Slander not so.

(1) (1917) A. C 406, (1868) 3 Q. B 360, (1902) 1 K. B 77, (1811) 170 E. R 1253, (1801) 102 E. R. 269.

(2) (1812) 128 E. R 767 : 13 R. R 636 (leading case), (1917) A. C. 309 (318). See 9 A 420.

cannot succeed unless he proves that he has suffered some actual damage thereby (1). The damage and not the insult is the cause of action in slander. The insult is the cause of action in libel irrespective of any question of damage which is presumed.

Cause of action in libel and slander.

The *first difference* does not exist in Indian law. For, in Indian law, libel and slander are both a civil injury and a criminal offence, so that one may either bring a suit for damages for the libel or the slander as the case may be, or prosecute the offender in the criminal court. See section 499 of the Indian Penal Code, "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes, etc".

Indian law

As for the *second difference*, courts in India followed the English law in earlier cases. But this difference too has since been narrowed down to almost vanishing point, it being laid down in later cases that the rule of English Common Law that an action for slander does not lie without proof of special damage does not apply and should not be followed in India (2). See *Slander* post.

The civil remedy for libel.

As observed above, libel may be the subject of both civil and criminal proceedings. In civil proceedings an action is brought by a person concerning whom a

(1) (1916) 2 A. C 481.

(2) 13 O. L. J. 681 : 1 Luck 386 : 3 O. W. N 443 : 95 I. C 90 : AIR 1926 O 363.

statement has been made which is calculated to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his trade, business, profession, calling, or office. He seeks to recover damages for the injury he has sustained. As a principle of equity, every man is entitled to have his reputation preserved in tact and any words calculated to infringe this right afford a good cause of action. He may sue for damages and may besides restrain by injunction the publication of the libel under the Specific Relief Act (1). He cannot succeed unless the defamatory statement which has been made concerning him was false. If the defendant can prove that the statement was true he has a complete defence to the action.

Truth complete defence.

Criminal prosecution.

In criminal proceedings a prosecution is instituted where the libel is in the nature of a public offence as tending to a breach of the peace by provoking the person libelled to break it. The peace of the community must not be disturbed and any person who provokes another to break it is guilty of a criminal offence. It is considered that a true statement is more likely to provoke than a statement which is false, and therefore in criminal proceedings *the greater the truth the greater the libel.* In criminal law truth is a justification only, if it is shown that the publication was for the public

Truth no defence.

(1) 51 A 509 : 27 A. L. J 303 : 115 I. C 458 : A.I.R 1929 A 214.

good (1). It is not enough for the defendant that the words complained of are true but he must also prove that it is for the public benefit that they should be published (2).

Difference between civil suit and crim prosecution.

In a civil suit for damages for libel and slander, thus, the principles applying to the criminal law of defamation have no application (3). The difference between a criminal case and a civil suit for libel is a difference not merely of form but is one of substance (4). A civil suit must be decided according to justice, equity and good conscience (5), that is, according to the rules of English Common law (6), in the light of judicial principles laid down by eminent English Judges and recognised jurists (7).

Civil suit after criminal prosecution.

The wronged person, as noted above, is entitled to both the civil and criminal remedies. He may bring either a criminal case or a civil suit; or a criminal case first and then a civil suit; or both simultaneously, the two being different. And the fact that there had been a criminal prosecution and conviction obtained before the civil suit for damages

(1) 152 I. C 1057 : A.I.R. 1934 A 904.

(2) 2 Agra H. C. 87

(3) 7 Bur L. T 253: 27 I. C 979, 15 N. L. J 149 : 29 N. L. R 24 : 141 I. C 362 : A.I.R 1933 N 47

(4) 26 A. L. J 760 : 115 . 119 : A.I.R 1918 A 316. See 24 A. L. J 329 : 92 I. C 429 : A.I.R 1926 A 287, 52 M. L. J 87 : 1927 M. W. N 83 : 25 L. W 770 : 100 I. C 90 : A. I. R 1927 M 329.

(5) 7 Bur L. T 253 supra, 51 A 509 : 27 ALJ 303 : 115 I. C 458 : AIR 1929 A 214.

(6) 15 N.L.J 149 supra, 1942 A.L.W 696, ILR (1943) 1 C 250 : 47 C.W.N 627. In default of special legislation, the Indian courts are to apply the rules of equity and good conscience which include the common law of England. So the English Common Law should be applied to Indian cases of defamation, 11 P 693.

(7) 51 A 509 supra.

was brought, is no reason for reducing the amount of damages which the plaintiff would otherwise get (1). For the same reason, the fact that an accused in a criminal case for defamation tenders an unqualified apology leading to the withdrawal of the criminal proceedings, does not bar a subsequent civil suit for damages for the libel. The apology in the criminal case is no defence in the civil action, unless at the time of giving the apology it is specifically agreed between the praties that the acceptance of the apology should also operate as an accord and satisfaction of the civil action (2).

Trial in England.

In England all cases whether civil or criminal are tried with the help of a jury.

Functions of Judge and jury.

The respective functions of the Judge and the Jury in an action for defamation are well established. The Judge is the judge of law and the jury of fact ; the Judge decides the question of law, namely, what in law constitutes defamation and when a statement may in law be taken to be defamatory of a person ; and it is for the jury to see whether by the law as decided by the Judge the statement amounts to defamation and is defamatory of the plaintiff. The Judge is to say whether the words

(1) I.L.R 1941 M 255 : (1940) 2 M. L. J 538 : 52 L. W 282 : 1940 M. W. N 892 : 191 I. C 600 : A.I.R 1940 M 870. See however 164 I. C 385 : A.I.R 1936 R 332 (the fact of the conviction taken into consideration in awarding damages).

(2) 1941 M. W. N. 786 : (1941) 2 M. L. J 674 : 197 I. C 784 : A.I.R 1941 M 860.

are capable of a defamatory meaning and are capable of being defamatory of the plaintiff. The Jury are to say whether they are in fact defamatory and defamatory of him (1). Whether for example an imputation of insolvency or insanity is defamatory is a question of law for the Judge, whether the words complained of do in truth impute insolvency or insanity to the plaintiff is a question of fact for the jury(2). The Judge must satisfy himself at the outset that there is a prima facie case to go to the jury. If he finds that there is no case to go to the jury, he must withdraw the case from the jury and enter a non-suit, i. e. dismiss the suit (3). If however there is a prima facie case it must be left to the jury (4). That is, if defamation is not made out the Judge may dismiss the suit and discharge the jury, if made out it must be referred to the jury on the facts proved and their verdict obtained. If the verdict of the jury is contrary to the direction of the Judge, the Judge may in a proper case set it aside and direct a new trial (5). In India there is no jury trial in civil cases and the Judge decides both on the law and the facts.

Trial in India

(1) 1946 A. L. J 289 : 1946 A. W. R. 142 : 1946 O. A 142 : 1946 M. W. N. 310 : 59 L. W. 111 : (1946) 1 M. L. J 152 : 223 I. C 103 : A.I.R 1946 P. C 13.
(2) (1882) 7 A. C. p. 775. See (1894) A. C 284, at 287.
(3) (1869) 4 Ex. 284 at p 288.
(4) (1877) 2 C. P. D 146.
(5) (1928) 139 L. T 521, at p. 542.

CHAPTER II.

SLANDER

As already observed slander is spoken or oral defamation and is not actionable without proof of actual damage.

Verbal abuse.

In English Common Law mere verbal abuse, which cannot be taken seriously by any one who hears it, is not defamation but is slander, so that a suit for damages for mere abusive and insulting language is not maintainable without proof of special damage. So mere scurrilous abuse like

Damned thief, cheat, fraud.

damned thief or *cheat* or words imputing general misconduct like *fraud*, *vice* etc., are not actionable per se. Similarly, the words *ananias* (suggesting wilful and deliberate

Silly, noozy.

falsehood), *poor*, *little*, *silly*, *noozy* referring to cotroversies about current topics are not actionable per se (1). Following the English law it has been held that abusive language which amounts merely to an insult uttered in the heat of a quarrel is not actionable(2) ; and in a case where the words

Sala, haramjada, soor, baperbata.

used were *sala*, *haramjada*, *soor* and *baperbata*, it was held that no action lay (3). It has

(1) (1894) A. C 284.

(2) 26 C 653 : 3 C. W. N 551 F. B., 32 C 1060 : 9 C. W. N. 847 : 2 C. L. J 396, 10 W. R 184, 12 W. R 369, 18 W. R 531, 15 B. L. R 101, 47 A 391 : 23 A. L. J 151 : 86 I C 922 : A.I.R 1925 A 371, 9 A. L. J 253, 5 Bur L. R 33, 1905 U. B. R 1, 4 L. B. R 50, 8 M 175 (180). See 52 M. L. J 87 : 1927 M. W. N 83 : 25 L. W 770 : 100 I. C 90 : A.I.R 1927 M 329.

(3) 26 C 653 ibid, see 28 C 452, 34 P. L. R 1071.

likewise been held that calling one an outcaste when the persons assembled were people belonging to the locality who knew that he had not been outcasted is a mere verbal abuse and is not actionable without proof of special damage (1). The above rule of English law however has not been absolutely followed in India and it has been held that where the abusive language is both insulting and defamatory a suit will lie without proof of special damage. Thus where the defendant abused the plaintiff and said that she was not the legally married wife of her husband but a woman who had been ejected from several places for unchastity, it was held that the defendant was liable though no special damage was proved (2). It is argued that it is not the intention of the law to put a premium on vulgarity, but that the essence of the matter is the sense in which those who hear the words spoken will take them. Where therefore the abusive language is uttered in such circumstances that having regard to the respectability and the position of the person abused, it is calculated to wound his feelings, or to lower him in the estimation of others, or to excite against him feelings of contempt and ridicule, it is defamatory and a suit will lie without proof of special

Outcaste.

The rule not absolutely followed in Ir

(1) 116 I. C 1078 : A.I.R 1933 L 727.

(2) 8 M 175 (180). See 10 M. L. J 83, 35 M. L. J 673, 52 M. L. J 87 supra,

damage (1). An abuse may be uttered merely to cause affront to the feelings of another, or as an insult to his sense of dignity or self-respect without other persons knowing of it, or without producing an impression in the minds of others hearing it prejudicial to his position or dignity. Where however it is uttered in circumstances tending, if not vindicated, to lower the person abused in the estimation of the people present, it will amount to defamation and will be actionable (2). So when on the face of them the words used clearly must have injured the plaintiff's reputation, he is entitled to recover a substantial amount without giving any evidence of actual pecuniary loss (3). And it has now been genarally held that the rule of English Common Law that an action for slander does not lie without proof of special damage does not apply, and should not be followed in India (4). So, unlike as in England, a suit for damages for slander without proof of special damage does lie in India and proof of special damage is not at all necessary to sustain a claim for

Rule now held not applicable in India.

(1) 1939 A L J 394 : 1939 A W R 220 : 183 I C. 236 : A.I.R. 1939 A 461, 34 C 48 : 4 C. L. J 388, 390, 12 C 424, 12 C 109, 8 M 175 (180)), 33 M 67: 19 M. L. J 714 : 6 M. L. T 290 : 3 I. C 855, 35 M. L. J 673, 10 A. 425, 1 A. L. J 102, 7 Bom H C 17, 47 A 391 supra. See, 17 Bom L R 82, 1 Bur L J 148 : A. I R. 1923 R 77, 1864 W R 302, 7 Bom A C 17, 3 C L R 181, 16 W R 83, 84 (n) : 6 B L R App 99, 1864 W R 269, 1 W R 19, 6 W R 151, 7 W. R 259, 8 W, R, 256, 13 O L J 618 : 1 Luck 386 : 3 O. W N. 443 : 95 I C 90 : A I R 192 O 363, 2 C W N cxxiii, 3 C L J 110.

(2) 1939 Mar L R 133 (civ)

(3) 1939 Mar L R 133 (civ), ibid.

(4) 13 O L J 618 : 1 Luck 386 : 3 O W N 443 : 95 I C 90 : AIR 1926 O 363. See 140 P, R 1882.

compensation for slander (1). In an action for slander in respect of words which are not defamatory in their primary meaning but which are capable of being understood in a secondary and defamatory sense by persons having knowledge of certain special facts, it is sufficient for the plaintiff to allege and prove that there are persons who know the special facts and so might understand the words in that secondary and defamatory sense without proving that any person did in fact understand them in that sense. The true test of the actionable nature of spoken as opposed to written words is their tendency to excite against the plaintiff feelings of hatred, contempt, ridicule, fear, dislike, or disesteem, due regard being had to the time at, and the circumstances in which such language was used, and cause the plaintiff to have a reasonable apprehension that his reputation had been injured and cause him pain in consequence of such belief (2).

When words have a primary and a secondary meaning.

Mere insult does not either amount to defamation (3). Defamation is a false statement or suggestion of fact to the prejudice of a man's reputation. Insult offends against a man's dignity but involves no false statement or suggestion (4). So insult in itself affords no cause of action by the law

Insult.

(1) 50 Mys H, C R 214.
(2) 50 Mys H, C. R 214, ibid.
(3) 28 C 452: 5 C W N 659
(4) (1862) 158 E R 839 : 130 R R 433

of England, though particular forms of insult are actionable when accompanied by other facts which afford a cause of action.

Assault, false imprisonment, wilful trespass.

Thus assault, false imprisonment, and certain kinds of wilful and wanton trespass to property amount to insult, being attacks upon the dignity of the plaintiff as well as upon his person or property and vindictive damages may be obtained in such cases. Insulting threats, not amounting to assault are apparently not actionable at all.

Where the plaintiff was invited to a sradh, but was afterwards turned out because he had participated in a widow remarriage, it was held that the defendant had not slandered the plaintiff (1).

Omitting titles of courtsey.

No suit for libel lies for omitting titles of courtsey in addressing a person (2). Calling a European or Anglo-Indian a native, though abusive is not defamatory (3). A railway guard when demanding of a passenger to show his ticket said 'I suspect you are travelling with a wrong (or false) ticket'. The words were sued upon as being defamatory. The guard was held to have spoken the words bona fide and the plaintiff was not entitled to recover damages (4).

Exceptions.

This rule that slander is not actionable per se without proof of special damage

(1) 28 M L. J. 58 : 17 M. L. T 369 : 2 L. W 446 : 26 I. C. 460.
(2) 3 M. H. C. R. A C 4
(3) 41 I C 696 (L. B),
(4) 13 M 34,

is however subject to the following exceptions :

I. WORDS IMPUTING COMMISSION OF CRIME.

When the words spoken charge the plaintiff with the commission of a crime for which he might be punished with imprisonment or corporal punishment, the words become actionable per se and no special damage need be proved (1). But the fact that the defendant may be arrested pending the trial is not punishment so as to make the words actionable per se (2). This exception applies only where the crime imputed is punishable with imprisonment or corporal punishment. Where the crime imputed is punishable with a fine only, it is slander and is not actionable per se (3). Thus a statement that the plaintiff is guilty of tampering with the loyalty of the sepoys amounts to an imputation of an offence punishable with imprisonment under the Indian Penal Code and is therefore defamatory (4). Similarly charging the plaintiff with the commission of serious offences, such as dacoity, extortion, arson etc., is defamatory and the plaintiff will be awarded damages even in the absence of evidence of actual

Imputing commission of crime.

Where crime imputed is punishable with fine only.

Imputation of serious offences.

(1) (1904) 2 K. B 287, (1835) 132 E. R 158 : 42 R R 633, (1599) 78 E. R 944, (1616) 80 E R 216(231), 13 M 34. As for imputation against a limited company, see (1945) 1 All E. R 563 (under 'Imputing professional misconduct').

(2) (1910) 1 K. B 609, (1904) 2 K. B 287 (arrest is not punishment).

(3) (1705) 6 Mod. 101 (even though in default of payment imprisonment is prescribed by the statute, imprisonment not being the primary and immediate punishment for the offence).

(4) 37 C 760 : 14 C. W. N 713 : 6 I C 81.

damage and notwithstanding the fact that the defendant has been punished under section 182 of the Indian Penal Code (1).

Imputing suspicion of a crime.

Words merely imputing suspicion of a crime are not actionable without proof of special damage (2). An imputation of a criminal offence, in order to be actionable per se, must be a distinct charge and must not be a mere statement or suspicion. It may be made in so many words, or it may be made in words from which the charge could be inferred, but the inference must be clear and unequivocal. It is for the plaintiff to prove that the words were capable of conveying, and did in fact convey, such meaning, and the evidence must be sufficiently strong and cogent for the purpose (3). The alleged slander was that the defendant had said of the plaintiff "You are a convicted person. I will not have you here, you have a conviction". The real basis of an action is that the misconduct alleged is of so serious a character that the law visits it with punishment and is therefore so likely to cause other people to shun the person defamed and to exclude him from society that damage is presumed and not that the plaintiff is put in jeopardy. The words, it was held, were capable of being construed as imputing a crime for which

(1) 26 A L J 760 : 115 I C 119 : A I R 1928 A 316, 35 C 495 : 12 C. W N 490.

(2) (1880) 6 App Cases 156, 43 Bom L R 631, infra.

(3) 43 Bom L R 631 : 196 I C 503 : A I R 1941 B 278.

the plaintiff has been or could have been sent to prison (1). Words imputing past conviction for an offence are actionable without proof of special damage as they cause other people to shun the person and to exclude him from society (2).

When imputation not actionable

But to falsely impute the commission of a crime is not actionable if the facts on which the imputation is based are stated and do not amount to a crime. Thus, charging a church warden with theft of the parish bellropes was held not actionable as the church warden was himself in possession of the bellropes (3).

II. WORDS IMPUTING CONTAGIOUS DISEASE.

Imputing contagious disease.

When the words spoken impute a *present* contagious disease to the plaintiff, entailing his exclusion from society, e. g. venereal disease, the words become actionable per se and no special damage need be proved (4). The disease imputed must be such as to imply disgraceful or improper conduct on the part of the plaintiff and not merely a misfortune. For example, an attack of small pox is only a misfortune, and so though the disclosure might entail exclusion from society, it will not be actionable. Similarly words imputing disease in the past are not actionable (5).

Exception.

(1) (1939) 1 All E R 798 : 160 L T 361 : 55 T L R 437.
(2) Ibid.
(3) (1597) 76 E R 896, 26 A L J 760 : 115 I C 119 ; A I R 1928 A 316.
(4) (1868) 3 Q B 396, (1864) 135 E R 140 : 66 R R 720, (1742) 93 E R 118, (1788) 100 E R 255, (1599) 78 E R 887, (1864) 7 M & Gr 334.
(5) (1788) 100 E R 255 ibid.

III. WORDS IMPUTING MISCONDUCT IN PROFESSION.

Imputing misconduct in profession or calling

Words which impute misconduct in one's profession or calling are actionable without proof of special damage (1). Anything is a trade or calling provided it is not illegal. The words should in fact be spoken of him in respect of his business and it must appear that the words tend to prejudice him in that profession (2). Thus in the leading case of Doyley v. Roberts (3), an attorney sued the defendant for slander for the words 'he had defrauded his creditors and had been horsewhipped off the course at Doncaster'. It was proved that the plaintiff was more busy on the turf than in the courts and owed many debts arising out of racing transactions. It was held that the words though spoken of an attorney did not touch him in his profession, any more than they would touch a person in any other trade or profession and were not actionable per se. A prospective tenant took a reference from H, a solicitor, to the landlord. The landlord who had some ill-feeling towards H said 'You have got one (reference) form that pimp H. It is quite worthless. His very calling as a solicitor makes him write whatever suits his client best. Damn it, he would sue his grandmother for 7s 6d'. In an action by the solicitor for slander it was held that the statement was a slander on the solicitor as a

Illustrations.

(1) 51 A 509 : 1929 A L J 363 : A I R 1929 A 214.
(2) 51 A 509 ibid.
(3) (1837) 132 E R 632 : 43 R R 810.

man not in the way of his profession and it was therefore not actionable per se (1). Similarly, the words that a solicitor 'had lost thousands' or 'gone for thousands' were held to be not actionable in the absence of proof of special damage (2). But to describe a journalist's communication as rubbish is actionable as the imputation is against his capacity as a journalist (3). Similarly, to say of a trader as using short-weights (4), or that he is insolvent (5), or of a merchant that he is 'broken' (6), or of a professional architect that he is incompetent (7), or of a clergyman that he preaches lie in the pulpit (8), is actionable. In the same way to impute incompetency to a surgeon or ignorance to a lawyer is actionable without proof of special damage (9).

Where office or calling is honorary.

Where the office or calling is not held by the plaintiff for profit, but is only honorary, the imputation must charge him with dishonesty, misconduct or want of integrity in relation to the office (10). Where the charge is of mere incompetence, without suggestion of misconduct, it will not be actionable per se (11). Thus, where the

Charge of mere incompetence not actionable.

(1) (1945) 1 All E. R. 453.
(2) (1901) 2 K. B 441.
(3) 41 I. C 696 (L.B).
(4) (1846) 115 E.R 1091.
(5) (1853) 138 E. R 1333 : 93 R.R 650, (1853) 13 C. B 596.
(6) (1620) 79 E. R 481.
(7) (1879) 41 L. T 588.
(8) (1652) 82 E. R 780.
(9) See 47 A 391 : 23 A. L. J 151 : 86 I. C 922 : A.I.R 1925 A 371.
(10) (1895) 1 Q. B 571, (1892) 1 Q. B 797.
(11) (1771) 96 E. R 439.

defendant stated that the plantiff 'is never sober, and is not a fit man for the council; on the night of the election he was so drunk that he was to be carried home', it was held to be not actionable per se (1).

Lord Herschells' summing up.

Lord Herschell in summing up the above case observed thus: "It is quite clear that as regards a man's business, or profession, or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. It is not necessary that there should be an imputation of immoral or disgraceful conduct. In all those cases, the law presumes such a probability of pecuniary loss from such imputation that it will not require special damage to be shown. But when you come to offices which are not offices of profit, the loss of which therefore would not involve necessarily a pecuniary loss, the law has been differently laid down. When the imputation is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit, is not an office of profit but one merely of what has been called honour or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office". So to call a Justice of the Peace a fool is not actionable (2). But

(1) (1892) 1 Q. B 797.
(2) (1662) 82 E. R 973.

imputation of corruption to a Justice of the Peace is actionable per se (1).

Slander of limited company.

Whether or not a limited company without proof of special damage can sue for a defamatory spoken word imputing the commission of a criminal offence for which, if it were a natural person, it could be sentenced to a term of imprisonment, there is no doubt that slander of a company in the way of its business is actionable without proof of special damage (2).

Imputation of unchastity or adultery.

In England at common law, before the Legislature intervened by enacting the Slander of Women Act, 1891 (54 and 55 Vict. c. 51), words imputing unchastity or adultery to a woman were not actionable without proof of special damage (3). This rule owed its origin to conditions peculiar to England and rested on most artificial distinctions and has been held to be not applicable to India. So that in India a claim for damages by a Hindu woman in respect of an allegation of unchastity is sustainable without proof of special damage(4). In fact it has been held that to impute unchastity to a woman is defamatory of

Law in India.

(1) (1724) 39 E. R 736.

(2) (1945) 1 All E. R 563

(3) (1834) 111 E. R 1 : 41 R. R 359, (1916) 2 A. C 481; except in the case of clergymen, see (1853) 156 E. R 126 : 96 R. R 721, (1916) 2 A. C 481, at p. 491.

(4) 55 M 727 : 62 M L J 603 : 1932 M. W. N 563 : 35 L. W 647 : 140 I. C 422 : A. I. R 1932 M 445 (8 M 175, 51 B 167 followed). Only in one case the Calcutta High Court applied the rule and held that such words were not actionable without proof of special damage, see 28 C 452. But this case has not been followed by the same and other High Courts.

her and her husband if she is married, so that besides the wife herself, the husband too can maintain a suit on his own behalf (1).

Parsis of Bombay

The law applicable to the Parsis of Bombay is the common law of England and so a suit for damages for slander of a Parsi woman is not maintainable without proof of special damage (2). But although the English law applies to the Parsis, in a recent case where a Parsi used words imputing adultery to a Parsi married woman, it has been held that the rule of justice and equity which renders slander of that kind per se actionable without proof of special damage, should be given effect to (3). In England now by the Slander of Women Act "words spoken or published which impute unchastity or adultery to any woman or girl, shall not require special damage to render them actionable" so that in England such words are now actionable per se.

Imputation of lesbianism.

Thus the imputation of lesbianism to a woman is an imputation of unchastity within the Act and she can succeed in an action for damages for slander notwithstanding that no pecuniary damage has been pleaded or proved (4).

Where actionable per se.

So to sum up, slander is not actionable per se without proof of special damage,

(1 4 C. L. J 388, 1 Bur L. J 148, (1915) 2 U. B. R 98 : 33 I. C 673, 7 L. B. R 86, 1 A. L. J 102, 32 C 1060, 34 C 48.

(2) 28 Bom L R 391 : 95 I. C 556 : A. I. R 1926 B 302.

(3) 51 B 167 : 28 Bom L. R 1334 : 98 I. C 949 : A. I. R 1927 B 22.

(4) (1942) 1 K. B 409 : (1942) 1 All E. R. 412.

except where, (a) it imputes the commission of a crime, or (b) imputes the existence of a contagious venereal disease (1), or (c) imputes unchastity to a woman, or (d) where the imputation is against the plaintiff in the way of his business or office (2), in all of which cases an action will lie without proof of special damage.

Charge of adu against respec man.

A charge of adultery against a respectable person is likewise actionable (3).

The Oudh court has gone a step further and has generally laid down that the rule of English Common Law that an action for slander does not lie without proof of special damage does not apply and should not be followed in India, and has held that to say that the plantiff has married an Ahir's daughter and should be put out of caste where as a matter of fact he has married a higher caste Thakur lady, is defamatory, not only of the plaintiff's wife, but also of the plaintiff (4).

Special dama

As already observed, special damage means actual damage. It must be the loss of some definite (temporal) material advantage, not merely the loss of reputation itself (5), such as loss of property, or gift, or

Loss of some material adva

(1) (1861) 7 M & Gr. 314.

(2) Not where the plaintiff is no longer in the trade, (1849) 8 C. B. 293.

(3) 3 C. L. J 140, 12 M 495.

(4) 13 O. L. J 618 : 1 Luck. 386 : 3 O. W. N 443 : 95 I. C 90 : A. I. R 1926 O 363. See 140 P. R 1882.

(5) (1864) 5 B & S 384, (1883) 11 Q. B. D 407 at p. 412, 415.

legacy, or business (1), or custom (2), or employment(3), or hospitality of friends(4), or membership of a club, society or association, or a proposed marriage (5), or society of husband or wife(6). But the mere loss of friendship, society or the regard of a person is not sufficient unless there is also loss of hospitality or other temporal advantage resulting therefrom, that is to say mere injury to feelings does not constitute special damage (7). Similarly, exclusion from membership of a religious society or a chapel from which no material advantage is derived does not constitute special damage (8).

t mere injury feelings.

The special damage must be the natural and reasonable result of the defendant's words (9), and must not be traceable to adventitious circumstances(10), that is to say it must not be too remote (11). It is too remote when it does not result directly from the defendant's words, but from the intervening act of a third person (12). Damage is also too remote if it is due not to the original slander but to a repetition of it

ural result of endant's words.

t too remote.

ien too remote.

(1) (1837) 173 E. R 475, (1838) 173 E. R 642.
(2) (1853) 138 E. R 1333 : 93 R. R 650, (1860) 141 E. R 906 : 121 R. R 667.
(3) (1836) 111 E. R 1268.
(4) (1871) 7 Q. B 112, (1807) 1 Taunt 39. See also (1833) 11 Q. B. D 407 (416).
(5) (1891) 60 L. J. Q. B 231 (232).
(6) (1861) 11 E. R 851 : 131 R. R 347, (1861) 9 H. L. C 577.
(7) (1669) 86 E. R 4, (1884) 54 L. J. Q. B 113.
(8) (1864) 122 E. R 874 : 136 R. R 601, (1886) 18 L R (Ir.) 138.
(9) (1904) 1 K B 138, (1861) 11 E. R 851 : 131 R. R 347.
(10) (1793) 170 E, R 276 : 3 R. R 686.
(11) Ibid.
(12) (1920) A. C 956. See also (1830) 131 E. R 81, (1793) 170 E. R 276 : 3 R R 686, (1860) 157 E.R 1257 : 120 R.R 679, (1874) 9 C.P 118, (1867) 10 L.T 263.

by the plaintiff himself (1), or by other persons (2). So loss of business since the publication of the slander is not sufficient, as it must have been due, not to the original slander but to its subsequent propagation by means of repetition (3). But it is otherwise if the original slander is published to so many persons that the diminution of business may be reasonably attributed to it rather than to subsequent repetition (4). There are two exceptions to the rule that damage caused by repetition of slander is too remote, namely, (a) where the original statement is made to a person who is under a legal or moral duty to repeat it (5), and (b) when repetition is authorised or intended by the defendant, for no result which is intended can be too remote. Illness resulting from the mental trouble produced by slander is too remote (6).

When special damage is proved, damages can be recovered not merely for it, but for the injury to the plaintiff's reputation generally, that is, compensation is not limited to the amount of actual loss, but proof of some actual loss is an essential foundation for a claim of general damages for slander (7).

(1) [illegible]
(2) [illegible]
(3) [illegible]
(4) [illegible]
(5) [illegible]
(6) [illegible]
(7) [illegible]

CHAPTER III

LIBEL.

Libel, what is.

It has already been stated what a defamatory statement is. Any defamatory matter put down in writing is a libel. There can be no exhaustive list of words which are defamatory, as this depends on whether, in the particular circumstances of each case, it has affected, or has tended to affect the reputation of the person spoken about. The test in all cases is whether the ordinary, just and reasonable man would have a lower opinion of the plaintiff, were the libel true (1). So a statement will not be defamatory merely because it tends to expose the plaintiff to ridicule and contempt among a particular class of people (2). Merely attributing unconventional conduct though it might lower a person in the estimation of a certain class of people but not of an average, reasonable, or right thinking man, would not amount to defamation ; for example, to say of a lady of fashion that she travelled in an omnibus or to say of a labourer that he was the ringleader of the nine hours' system (3), or of a physician that he was in consultation with a homeopathist (4), does not amount

The test.

Not the view of a particular class.

Illustrations.

(1) (1921) 90 L. J. K. B 883, 1931 A. L. J 16 : 129 I. C 551 : A. I. R 1931 A 126.

(2) (1863) 8 L. T (N. S) 397, (1874) 9 C. P 118, (1921) 90 L. J. K. B 883, 1930) 1 K. B 467 (479).

(3) (1874) 9 C. P 118.

(4) (1863) 8 L. T 307.

to defamation. As has been said 'there is a distinction between imputing what is merely a breach of conventional etiquette and what is illegal, mischievous or sinful, between matters of taste and matters of crime' (1).

Gatley has made the following collection of words which have been held to be defamatory :

Words held to be defamatory.

"It is libellous to write and publish of a man that he is a rogue or a rascal, a swindler or a sharper, a crook, a coward, a liar, a hypocrite, a villain, a blackguard, a blackleg, a libeller, a slanderer and scandalmonger, an habitual drunkard ; or that he is dishonest or immoral, or wanting in gratitude. It is libellous to publish of a man that he has been guilty of oppressive, intolerant, insulting, or unbrotherly conduct. It is libellous to impute 'any dishonourable conduct to another though not involving a breach of positive law.' It is libellous to publish of a man that he has falsely accused another of a criminal offence, or that he has cheated at horse racing or at cards, or that he has been blackballed on seeking admission to a club, or that he has entertained persons at his house with a view to winning their money by gaming, or that he is not a proper person to be entertained in society. And it has been held libellous to call a man who has been convicted of felony 'a convicted

(1) (1863) 8 L.T 307, ibid, per Pollock C. B.

held that when there was no resulting loss of caste and the statement was made honestly, there was no libel (1). Similarly it has been held that the resolution of a Panchayet excommunicating a person for breach of caste rules, if not malicious, does not afford a ground for maintaining a suit for libel(2).

sual form of efamation.

The most usual form of defamation consists in an attack upon the moral character of a person, attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, ingratitude or cruelty (3). A mere statement that a certain person was indebted to another is not defamatory, but where the words used are 'should he persist in refusing payment there seems to be no alternative to the very unpleasant one of taking the matter to Court' which impute to that person a deliberate intention to avoid payment as possible and suggest that he is not likely to long as pay unless he was compelled by legal proceedings, the words, if untrue, are defamatory (4). But a statement is equally defamatory if it tends to bring a person into ridicule even though there is no suggestion of any form of misconduct (5). Thus an action will lie for the publication

ttack upon ioral character.

tatement of ndebtedness

Bringing a person nto ridicule.

(1) 1 Hay 539 : Marsh 224.

(2) 39 A 561 : 15 A L. J 629 : 21 C. W. N 1113 : 26 C. L. J 282 : 19 Bom L. R 707 : 33 M. L. J 103 : 22 M. L. T 132 : 1917 M. W. N 817 : 6 L. W 494 : 2 Pat L. T 125 : 44 I. A 192 : 40 I. C 641 P. C (12 A. L. J 552 : 23 I. C 301 affirmed). See 12 M 495.

(3) (1869) L. R 4 Ex. 284, (1829) 9 B & C 172 : 32 R. R 621.

(4) (1943) K. B 319 : 112 L. J (K. B) 430.

(5) (1830) 6 Bing 409 : 31 R. R 456, 3 Salk 225.

of a humorous story which exhibits the plaintiff in a ridiculous light, or for a caricature of his personal appearance or manners (1).

Causing a person to be shunned.

Again, a defamatory statement need not necessarily expose a person to hatred, contempt or ridicule, if it has the effect of causing a person to be shunned or avoided by other persons, it would amount to defamation. Thus where the plaintiff a lady was represented as having been raped, it was held to amount to defamation (2). It would similarly be defamatory to say of a married woman that she has been divorced, or to write about a respectable person that he is an insolent upstart (3).

Reflection upon fitness in profession.

Next, a statement is defamatory if it amounts to a reflection upon the fitness or capacity of a person in his profession or trade, or in any other undertaking assumed by him. For a man is brought into contempt or disesteem if he is charged with professing to do a work for which he is unqualified (4). Thus, it is actionable to say of a governess that she is insane (5), or of a solicitor that he is ignorant of law, or to say of a physician that he has ill-treated a patient, or that he is a quack (6), or of an

Illustrations.

of Solicitor.

of Physician.

(1) (1921) 1 A. C 367, (1769) 95 E.R 886, (1830) 130 E.R 1338 : 31 R. R 456
(2) (1934) 50 T. L. R 581.
(3) 9 A. L, J 253 : 13 I. C 506.
(4) (1882) 7 A. C 741, at p. 771, (1872) L. R 7 C. P 606, (1901) 2 K. B 1, (1731) 93 E. R 925.
(5) (1863) 8 L. T (N. S) 800, (1899) 1 Q. B 455.
(6) (1908) 2 K. B 325 (n), (1831) 172 E. R 875.

Artisan. artisan that he does bad work (1), or of the Chairman of a finance committee that he has falsely audited the accounts (2), or of

Architect. an architect that he is wanting in profes-

Bank. sional experience (3), or of a bank as

Company. having stopped payment (4), or of a company that its directors are aliens or that it

Newspaper. holds out false hopes, or of a newspaper that it sells advocacy. So also, it is defama-

Lawyer tory to say of a lawyer sophistical in argument (5), or that he got up a receipt with false recitals in respect of his remunera-

Actress. tion (6), or to say of an actress that she is ten years older than what she professes (7).

To publish a statement in a newspaper in respect of a married woman who is an

Instructress. instructress in physical culture and dancing and who also runs an "Udyoga ashram" for poor Parsi girls where instruction is given to them in various useful arts free of charge that she is unfit and incompetent for the purpose is defamatory ; and to add that the future of the girls, including their social, religious and moral future, would be spoilt by attending classes of that type, is to impute to her an unfitness which is worse than attributing mere incapacity in her profession and is a libel (8). To publish an

(1) (1853) 22 L. J. C. P 151 ; see (1700) 91 E. R 1308.
(2) (1829) 148 E. R 1159.
(3) (1879) 41 L. T 558.
(4) (1826) 130 E. R 587.
(5) See 32 M. L. J 392 : 5 L. W 598 : 40 I. C 120.
(6) 24 M. L. J 8.
(7) (1901) 18 T. L R 165.
(8) 43 Bom L. R 631 : 196 I. C 503 : A. I. R 1941 B 278.

ordinary story over the name of a distinguished novelist is likely to belittle him in the eye of the public and so would amount to defamation (1). Similarly, the publication of an inaccurate edition of a book by the purchaser of the copyright is actionable by the author (2). So also an artist can maintain an action for libel for damages caused to his reputation by an unskilful reproduction of his work (3).

Ordinary story over name of distinguished novelist.

Inaccurate edition of book.

Unskilled reproduction of work of art.

A statement is defamatory if it says of a trading company that it is insolvent or incompetently managed (4). It is likewise defamatory to impute future insolvency to a trading company. Where it was said with reference to the plaintiff company that 'as no such company working on the dividing plan has ever survived twelve years, the question of the fulfilment of the guarantee has never arisen and is never likely to arise in future', it was held that the words exceeded the limits of fair comment, but clearly imputed insolvency to a going concern in the way of its trade or business and so were defamatory (5). In the same way, to say of a company or trading corporation as started by a set of adventurers, or

Imputing future insolvency to a company.

(1) (1913) 29 T. L. R 592. See also (1925) 42 T. L. R 29.

(2) (1832) 172 E. R 947: 38 R. R 810.

(3) 42 C. W. N. 1045.

(4) (1853) 22 L. J. C. P. 151, (1859) 157 E. R 769, 792: 118 R. R 338. See (1875) 10 C. P. 502, (1884) 1 Q. B 133.

(5) 37 Bom L. R. 1033: 161 I. C. 769: A. I. R. 1936 B 114 (general observations on prospects of companies working on a dividing plan, e. g., that such companies are unacturial and therefore unscientific, unsound and unworkable and would come to grief unless they resorted to unfair tactics or methods are fair comments and not defamatory).

to place it under a heading like 'Fraudulent insurance companies which sell poor people' is certainly defamatory as it affects the company prejudicially in the way of its business (1). But words reflecting on the personal character or reputation of the officers of a company are not actionable per se without proof of special damage, but only words reflecting upon a company in the way of its property, trade or business are actionable per se (2). Similarly, a statement attributing corruption or bribery to a Municipal Corporation is not actionable as it does not affect the property or business of the municipality (3).

Reflection on reputation of officers of a company.

Attributing corruption to Municipality.

A statement is defamatory which says of a tradesman that he is dishonest (4). A statement is defamatory if it imputes insolvency to a trader, whether or not the statement includes any suggestion of discreditable conduct or incapacity, and this is so in view of the very serious mischief which an unfounded allegation of insolvency might work (5). Such a statement is defamatory even though it be not calculated to hold up the person to hatred, contempt or ridicule. In a suit for damages for defamation in respect of such a statement, it is not necessary for the plaintiff to prove that

Attributing dishonesty, or insolvency to a trader.

(1) 37 Bom L. R 1033 : 161 I.C. 769 : A I.R. 1936 B 114.
(2) Ibid.
(3) (1891) 1 Q. B 94.
(4) 51 A 509 : 27 A. L. J 303 : 115 I. C 458 : A. I. R 1929 A 214.
(5) (1700) 1 Lord Raym 610, (1875) L. R 10 C. P 502.

the words are false. If the words are defamatory they are presumed to be false, and it is for the defendant, if he seeks to justify them, to prove that they are substantially true. Nor is it necessary for the plaintiff to prove any malice on the part of the defendant. It is only for the purpose of rebutting the defence of qualified privilege that it becomes necessary to prove express malice in the sense of improper motive on the part of the defendant (1).

Not necessary to prove falsity.

Not necessary to prove malice.

When only malice to be proved.

But a statement or conduct which merely causes annoyance is not defamatory, for example the publication of a person's photo without permission (2), or to say that a person died, or got married before the date fixed (3), or to say of a Judge that he does not know law. But Judges have to be impartial in the administration of justice, and so to impute partiality or corruption to a Judge is serious and is defamatory. Similarly an imputation of selfish and corrupt motive to the Secretary of a Railwaymen's union who took a leading part in arranging a strike has been held not to be libellous as such charges are usually made and are not understood as injuring the reputation (4). One Mr. Byrne the plaintiff was a member of a golf club and the defendants Mr. D and his wife Mrs. D were the proprietors and

Statement causing annoyance.

Illustrations.

Imputing partiality or corruption to Judge.

Byrne's case.

(1) 43 Bom L. R 631 ; 196 I. C 503 : A. I. R 1941 B 278.
(2) (1906) 22 T. L. R 532.
(3) (1926) 42 T. L. R 238.
(4) 30 M. L. J 294 : 3 L. W 67 : 32 I. C 408.

sole directors of the club and the wife was also its secretary. Certain automatic gambling machine had been kept upon the club premises from 1932 for the use of the members. Some one gave information to the police about this machine upon which the police directed their removal and they were removed. The next day some one put up on the wall of the club a typed paper with the following verse written thereon,—

mputation of iving informaion to police.

> For many years upon this spot
> You heard the sound of a merry bell,
> Those who were rash and those who were not
> Lost and made a spot of cash.
> But he who gave the game away
> May be Byrnn in hell and rue the day.

The word 'Byrnn' was blacked out and the word 'burn' substituted for it in the original, but in the carbon copy underneath it the word 'byrnn' remained. Rule 12 of the club's rules provided that no notice or placard, written or printed, shall be posted in the club's premises without the consent of the secretary. The secretary admitted having seen the notice, but stated that she did not remove it as she did not think it harmful but only thought that one member of the club was poking fun at another. The plaintiff brought the action for libel alleging that Mr. D and Mrs. D had published or caused to be published the words concerning him. Hillbery J. held that the words were defamatory and that as the defendants had complete control of the

walls and could have taken down the paper after they had seen it, the writing could only have been done with their approval and awarded nominal damages. On appeal it was held that the words were not defamatory as there was nothing defamatory in saying that one has reported certain facts, wrongful in law, to the police. The criterion is what a good and worthy subject of the King would think of some person of whom it had been said that he had put the law into action against wrongdoers (1).

Interpretation of defamatory statement.

The whole of the defamatory writing must be read and understood in its natural (2), and not literal or strict sense. It should not be taken in parts (3), but as has been said, the bane and the antidote should be taken together (4), and if there is any document referred to therein, that should also be read along with it (5).

Defamation by figures, caricatures.

Next, the defamation complained of may not be in the from of words. It may be in the shape of figures, caricatures, or other visual representations (6). It might even consist in conduct which has the effect of exposing a person to contempt or ridicule, for example, suspending a lamp in day time opposite a person's house suggesting

by conduct.

(1) (4937) 1 K. B 818 : 106 L. J (K. B) 533 : 157 L. T 10.
(2) 35 C. W. N 271 : 52 C. L. J 345 ; 129 I. C 863 : A. I. R 1931 C 81.
(3) (1810) 170 E. R 1196 : 11 R. R 748, (1836) 173 E. R 298. See (1894) A. C 284.
(4) (1835) 150 E. R. 67 : 41 R. R 707.
(5) (1824) 171 E. R 961 : 27 R. R 773, (1824) 107 E.R. 535 : 26 R. R 515.
(6) (1813) 170 E. R 1397 : 14 R. R 752, (1894) 1 Q. B 671.

by portrait, engraving or effigy.

by burning an effigy.

bawdy-house (1), or preparing a portrait, engraving or effigy of a person and placing it in a gallery consisting of portraits of murderers (2). Exhibiting an effigy (3), or burning a man in effigy (4), is defamation.

Defamatory statement and injurious falsehood.

A defamatory statement must be distinguished from one which is merely injurious. Both are falsehoods told by one man to the prejudice of another, but the two differ in several essential respects, namely, (a) defamation causes injury to one's reputation; an injurious falsehood is a false statement respecting another's property or business which causes him loss or damage, but does not affect his personal reputation; (b) in defamation special damage need not be proved, but in injurious falsehood an action will not lie without special damage; and (c) in defamation malice need not be proved,

Malice essential in injurious falsehood.

but in injurious falsehood malice is an essential element. Injurious falsehood in fact is another kind of tort different from defamation. Thus where a defamatory statement against a trademan's wife affects his business, he may sue, not for defamation, but for damages for the injurious falsehood (5). Similarly, a wilfully false statement that a person has closed his business is not defamation, for, if he has not, he will

Illustrative cases of injurious falsehood.

(1) (1809) 103 E. R 991, (1830) 109 E. R 842 : 35 R. R 329.

(2) (1891) 1 Q. B 671, (1810) 170 E. R 1235 : (1810) 2 Camp 511 ; 11 R. R. 782, 2 N. W. P 435.

(3) 2 A. H. C. R 435.

(4) 42 J. P 68.

(5) (1876) 1 Ex. D. 91.

not suffer in reputation, in as much as those who know him will readily dismiss it as false, but is an injurious falsehood if actual loss and damage has been caused thereby and an action will lie (1). To state falsely that one carries on business incompetently or dishonestly is defamatory and an action will lie even though the statement is not wilfully false and even though actual damage is not caused by it. To state falsely of a shopkeeper that his goods are of a quality inferior to those of another trader is not the worng of defamation, but is injurious falsehood. But to say of him that he fraudulently sells inferior goods as of superior quality is an attack, not merely upon his business but upon his reputation and is therefore defamatory (2). That is, if an injurious falsehood also reflects on reputation, it is defamatory. So, to state that the plaintiff is selling obscene books (3), or bad wine (4), or useless typewriters(5), is defamatory and an action will lie. Plaintiff advertised in a newspaper for the sale of a picture as being the work by Ravi Varma. A correspondent doubted the genuineness of the picture. There was no bad faith or dishonesty imputed to the

Injurious falsehood reflecting on reputation.

(1) (1892) 2 Q. B 524.

(2) (1889) 81 L. T 331, (1894) 1 Q. B at p. 139. See Salmond, Law of Torts, Second Edition, pp. 403-405.

(3) (1888) 20 Q. B 275, (1889) 14 Ch. D 763, 864, (1871) 7 Q. B 11, (1808) 170 E. R 981 : 10 R. R 698, (1871) 25 L. T 44. See (1915) 31 T. L. R 403.

(4) (1894) 1 Q. B 133, (1887) 18 Q. B 771.

(5) (1889) 81 L. T 331.

plaintiff, so it did not constitute libel (1). The defendants who were importers of piece goods, sold by public auction certain goods ordered by the plaintiffs but not taken delivery of by them, after giving this notice, namely "the following goods of plaintiff will be sold by public auction because of their refusal to pay and take delivery of the goods they had purchased." The notice did not constitute a libel (2).

Various forms of defamatory statement.

Next, the defamatory statement may take innumerable forms. A defamatory imputation may be conveyed not merely by a direct statement, but also indirectly by means of headings, headlines, figures of speech and in various other ways (3). The test is whether the imputation tends to hold up the person referred, to hatred, contempt or ridicule. So the statement may not be in direct words and may still be defamatory. An ingenius libeller or slanderer may make use of words which in their ordinary sense are innocent, but yet may convey an imputation which is actionable. For instance to say of a lawyer that he is ambidextrous may be to use a very innocent word, but the meaning or "innuendo" may be that he is in the habit of receiving fees from both sides, and if it should be understood to convey this meaning the statement is defa-

Innuendo

(1) 9 M. L. T 230 : (1911) 1 M. W. N 226 : 9 I. C 279.
(2) 1931 A. L. J 16 : 129 I. C 551 : A. I. R 1931 A 126.
(3) 37 Bom L. R 1033 : 161 I. C 769 : A. I. R 1936 B 114.

matory (1). So an allegation which on the face of it contains no imputation whatever, may be proved from the circumstances to have contained a latent and secondary defamatory sense. It may suggest an imputation which it does not express. Even the language of praise may be sued on as defamatory on proof that it was used in the way of irony (2). Similarly, the language of jest, if it conveys a serious imputation is defamatory and he who so jests does so at his peril (3). Where the words complained of are not prima facie defamatory, it is open to the plaintiff to allege and proof that the words have got a special secondary significance in reference to the context, and that understood in that light, they are defamatory (4). In such a case, the latent or defamatory meaning must be sufficiently proved by the plaintiff. The evidence of the defendant that he never intended the words to convey the meaning alleged is immaterial. The only question is in what meaning the words would be understood by ordinary persons (5). Even an allegory may be a libel if a perusal of the story at once leads an ordinary reasonable reader to connect it with the plaintiff, and it is futile for the defendant to argue that he did not

Libel by language of praise.

by language of jest.

Plaintiff to allege and proof innuendo.

Defendant's denial is immaterial.

Libel by allegory.

(1) 33 M 67 : 19 M. L. J 714 : 6 M. L. T 290 : 3 I. C 955.

(2) 51 R. R 676 : (1838) 4 M & W 446, (1838) 150 E. R 1504, 42 C. W. N 1045 (there is implied defamation).

(3) (1882) 7 A. C 741, at p. 772.

(4) 38 R. R 568 : (1832) 149 E. R 293.

(5) 1935 A. W. R 440 : 1935 O. W N 327 : 41 L. W 665 : 37 P. L. R 118 : 153 I. C 1 : A. I. R 1935 P. C 34.

What plaintiff is to prove where innuendo alleged.

intend to defame the plaintiff but that he only used a name at random as a mere representative of a class dealt with in the story. The plaintiff in such cases of libel can aver extraordinary facts to show that he is the person expressly referred to. The plaintiff need not produce persons enquiring of him after the publication of the article. Nor is it necessary that all the world should understand the libel. It is enough if those who knew the plaintiff came to suppose that he was the person meant (1). When circumstances are proved which will clothe with a defamatory meaning words otherwise innocent, the question must be, as in the case of words per se defamatory, whether reasonable people who know the special circumstances might understand them in a defamatory sense. It is unnecessary, though not inadmissible, to call persons to say that they did so understand the words, provided that it is true that they are people who might so understand them (2). The plaintiff must

(1) 37 P.L.R 670: 157 I. C 851: A.I.R 1935 L 328. See however 37 Bom L. R 1033: 161 I. C 769: A. I. R 1936 B 114, where it is said that evidence of some people is not sufficient. Where a plaintiff in an action for libel alleges that though he is not mentioned by name he is the person at whom the libel is aimed, or where a name is mentioned, that it would be understood by those who know him to refer to him, witnesses can be called to prove that they understood the words to refer to him, But they cannot be asked what meaning they attached to the words, because that is the very question the jury have to decide. Where such questions have been allowed to be put without any objection it would be too late to raise the question of their admissibility in the appellate court as a ground for setting aside the verdict of the jury, 1946 A.L. J. 289: 59 L. W 111: (1946) 1 M.L.J 152: 223 I.C. 103: A.I.R 1946 P. C 13.

(2) (1940) 2 K, B 507: (1940) 3 All E.R 31: 56 T.L.R 758.

xpressly and explicitly set forth in his leadings the defamatory sense which he ttributes to it (1). Such an explanatory tatement is called an "innuendo". The llegations of the special facts and circumtances by reason of which the words comlained of become actionable are called a 'colloquium". The plaintiff is bound by his wn 'innuendo', and must prove the meang as so alleged by him. He cannot at the rial fall back upon some other secondary nd latent sense instead of that which he imself alleged in his pleadings (2).

Plaintiff to set forth the alleged defamatory sense.

Innuendo.

Colloquium.

Plaintiff bound by his innuendo.

The statement that the plaintiff is o better than his father, where the father vas a convict, is defamatory, the innuendo eing obvious. The plaintiff was a married voman. The defendant published an nnouncement of her engagement in a newsaper. It was defamatory as the innuendo vas that she was living in adultery (3). imilarly, a statement that the plaintiff ad given birth to a child although she vas married only a month previously vas defamatory, the innuendo being that he led an immoral life before marriage (4). The plaintiff was the wife of F. H. a boxer nd living apart from him and this fact vas proved to be known to persons in the

Illustrative cases of innuendo.

(1) (1863) 12 W R 75, (1890) 62 L.T 121, (1863) 9 L.T 329

(2) (1880) 6 A. C 156. When the statement is prima facie defamatory, it is not necessary to prove the innuendo and if he fails to prove , he can fall back upon the primary defmatory sense of the statement, (1868) L. R 3 Q. B at p. 402, (1901) 2 Ir. R 465.

(3) (1929) 2 K. B 331. See also (1830) 109 E. R 526.

(4) (1902) 4 F 645.

neighbourhood. The defendants published in their newspaper these words, namely, 'F. H's curly haired wife sees every fight....'. The plaintiff's hair was not curly. The plaintiff alleged an innuendo that the words meant that she was a dishonest woman falsely representing herself to be, and passing as the wife of F. H., that she was unmarried and had cohabited with and had children by F. H. It was held that the words were capable of the innuendo and the defendants were liable to damages (1). The plaintiff, a co-operative society, though there was no question whatever as to any moral guilt or fraud, was charged as a test case with making a false return in respect of a particular entry, which was wrong. Plaintiff's auditors and legal advisers had given the opinion that a certain accession to the wealth of the society could be treated as capital, but the public auditor contended that it should be treated as profits. The plaintiffs were fined on the charge. The defendants, a newspaper, published a report with a prominent headline in bold types "False profit return charge against society", followed by an account of the proceedings which in their natural meaning were an accurate statement of the facts with some portions printed more prominently than others. The plaintiff pleaded an innuendo that the

Charge of false return by Co-operative society.

(1) (1940) 2 K. B 507 : (1940) 3 All E. R 31 : 56 T. L. R 758.

words were meant and understood to mean that the plaintiff had deliberately falsified their accounts and that they had published a return of their annual which they knew to be wrong, and that they had done so with a view to deceiving their constituents and the general public as to their true position and that they were insolvent or unstable and a society which investors should avoid and that they carried on their business by dishonest methods. The defendants objected to the innuendo on the ground that the words in their natural and ordinary meaning were incapable of the innuendo. It was held that having regard to the ambiguous, if not the primary meaning of the word 'false', namely that it connotes something of a fraudulent nature and the mode and occasion of the publication, the words were capable of the innuendo and the plaintiffs were entitled to more than nominal damages (1). Other cases of innuendo are where words are put in the form of a question suggesting the answer (2), or where the words used are understood in a special or secondary meaning (3), or where the words constitute a slang or a provincialism (4), or where it is a technical term having a special defamatory meaning, for example 'quack' meaning a medical imposter, 'black-

Other cases of innuendo.

(1) (1940) 1 K. B 440 : (1940) 1 All E. R 1 : 1940 W. N 9 : 109 L. J (K. B) 273 : 56 T. L. R 195 : 162 L. T 82.
(2) (1835) 132 E. R 158 : 42 R. R 633,
(3) (1813) 152 E.R 811.
(4) (1858) 175 E. R 755, (1591) 78 E. R 505.

Where the words are ambiguous.

leg' meaning a cheat at cards (1), or 'duffing' meaning faking. Where the words are ambiguous, it must be decided on evidence whether they were intended to bear a libellous meaning (2). Where a term is capable of several innocent interpretations and only one bad interpretation, the bad one is not to be seized upon to allege a dafamatory sense (3). In such a case it has been said that it is the person who does so is the real defamer (4). So if a newspaper article is ambiguous and may be interpreted either as defamatory or innocent, it is interpreted in favour of the accused and the more sinister interpretation should not be put on it (5).

Held to be not defamatory.

A trader issued a circular letter to his customers to say that he would not in future receive payment by cheques drawn upon a certain bank. There might be various innocent reasons for this step, also the defamatory one that the bank was not reliable and cannot be trusted to honour the cheques of their customers. It was held not to be defamatory although it was proved that some of the persons had taken it to bear that innuendo and consequently there

(1) (1843) 152 E. R 811, (1846) 153 E. R 1141.

(2) 33 M 67 : 19 M L. J 714 : 6 M. L. T 290 : 3 I. C 955.

(3) (1880) 5 C. P. D. at p. 511 per Brett L. J., (1882) 7 App. C 741, (1910) 2 Ir. R 166, 1934 A. L. J 43 : 147 I. C 982 : A. I. R 1934 A 203, 1931 A. L. J 16 : 129 I. C 55 : A. I. R 1931 A 126, 168 I. C 853 : A. I. R 1937 R 105.

(4) (1882) 7 A. C 741, at p. 792.

(5) 24 I.C 794. See 1931 A.L.J 16 supra, 1934 A.L.J 43 : 3 A. W.R 161 : 147 I. C 982 : AIR 1934 A 203 (large number of interpretations).

was a run on the bank (1). The name of the plaintiff was published under the heading of persons against whom exparte decrees had been obtained, the statement was not defamatory, as it did not imply inability to pay debts (2). A statement that the plaintiff's agency has been closed by directors(3), or that the plaintiff is no longer in employ, to whom orders or payment should not be made (4), or that the plaintiff's connection with the institution has ceased and he is not authorised to receive subscriptions (5), or that the plaintiff cannot be accepted as a student in a dental hospital(6), or that the plaintiff is not, and never was a captain in the Royal Artillery, suggesting thereby that he was an imposter (7), or that the plaintiff sued his mother-in-law(8), or the return of a cheque by a bank acting in error with the endorsement "reason assigned, not stated" (9), is not defamatory. But where a chocolate manufacturing firm, in advertising their chocolates published the portrait of a prominent amateur golf champion with a packet of their chocolate protruding from his pocket, and the innuendo alleged was that the eminent

Held to be defamatory.

(1) (1882) 7 A. C 741.
(2) (1913) A. C. 386. See however (1920) A. C 66 at p. 69.
(3) (1897) A. C 68.
(4) (1907) 24 T. L. R 169.
(5) (1875) 10 Q. B 519.
(6) (1910) 2 Ir. R 577.
(7) (1873) 29 L. T 472.
(8) (1863) 9 L. T 329.
(9) (1905) 22 T. L. R 760.

player had prostituted his reputation as an amateur golf player for advertising purposes, which was the only possible interpretation, it was defamatory and the player was awarded damages (1). Similarly, a publication in a trade gazette that judgment was recovered against the plaintiff, appearing side by side of bankruptcy notices and bills of sale (2), a publication after a bill had been returned unpaid by a bank owing to a moratorium, that divers steps had been taken to obtain payment without result (3), the publication in a musical journal placing the plaintiff's name third in order, the first and last being superior positions indicating reputaion (4), or not starring a music hall artist in bills and placards, have been held to be defamatory.

Allegations presumed to be untrue.

The facts alleged by the defendant against the plaintiff are presumed to be untrue (5), and it makes no difference that they are put in the form of a rhetorical question, or are stated as conclusions of fact drawn from evidence (6). But the defendant may plead justification that the statement is true (7).

(1) (1931) A. C. 333 : 100 L. J. K. B 328 (reversing (1930) 1 K. B 467 : 99 L. J. K. B 149). See also (1932) 2 K. B 431.

(2) (1888) 22 Q. B. D 134.

(3) (1919) A. C 304.

(4) (1896) 12 T. L. R 195.

(5) 36 C 883 : 13 C. W. N 895 : 6 M. L. T 73 : 3 I. C 224.

(6) 22 L. W 26 : 85 I. C 900 : A. I. R 1925 M 950.

(7) The defence that the statement is true is termed a plea of justification.

CHAPTER IV

QUESTIONS IN A SUIT FOR LIBEL.

The question for decision in a suit for ibel therefore is whether the article is ibellous and whether it designates the plaintiff in such a way as to let those who know the plaintiff understand that he is he person meant. So in an action for libel he plaintiff has to prove,—

(a) that the matter complained of is defamatory,

(b) that it refers to the plaintiff,

(c) that it was published, and

(d) that the defendant published it.

(a) That it is defamatory :

It has already been stated when a statement may be considered to be defamatory.

(b) That it refers to the plaintiff :

It is not only necessary that the matter complained of must be defamatory, but it is equally essential in every action for defamation that the defamatory statement should be shown to refer to the plaintiff (1). It is not necessary however that this reference should be express. It may be latent, and it is sufficient in such a case that it should have been understood even by one person, although it remained hid from all others.

Reference may not be express.

(1) (1849) 137 E. R 235, (1827) 108 E. R 794, (1925) 41 T.L.R 475, (1564) E. R 442.

By whatever name a man is called, if those who look on know well who is aimed at, the very same injury is inflicted if his real name were ten times repeated (1). If it is clear that the libel designates the plaintiff in such a way as to let those who know him understand that he was the person meant, it is not necessary that all the world should understand the libel; it is sufficient if those who know him can make out that he is the person meant (2). Where a plaintiff in a libel action alleges that though he is not mentioned by name he is the person at whom the alleged libel is aimed, or where a name is mentioned, that it would be understood by those who know him to refer to him, witnesses can be called to prove that they understood the words to refer to the plaintiff (3). Where the words used by the defendant are general, yet if there is sufficient particularity as regards the plaintiff, an action will lie (4). Where the defendants published in a newspaper a statement that in some of the Irish factories cruelties were practised upon the work people, they were held liable as the statement was understood to refer specially to the plaintiff's factory (5). It is now

Sufficient if understood to refer to plaintiff by those who know him.

Witnesses who understood the reference.

(1) (1848) 1 H. L. C.. at p. 668.

(2) 175 I. C 9 : A. I. R 1838 S 88.

(3) 1946 A. L. J 289 : 1946 A. W. R 142 : 1946 O. A 142 : 1946 M. W. N. 310 : (1946) 1 M. L. J 152 : 59 L. W 111 : 223 I. C. 103 : A.I.R 1946 P. C 13.

(4) (1848) 9 E. R 910 : 73 R. R 213, 62 C 838 : 39 C. W. N 845, 1937 A. L. J 781 : 1937 A. W. R 708 : 171 I. C 534 : A I R 1937 A 677, 175 I. C 9 : AIR 1938 S 88.

(5) (1848) 1 H. L. C 637, (1848) 9 E. R 910 : 73 R R 213.

settled that an intention on the part of the defendant to defame the plaintiff is neither necessary (1), in as much as liability for libel does not depend on the intention of the defamer, but on the fact of defamation (2). Formerly the law on the point had not been clearly laid down and was for that reason uncertain and following those earlier English cases the Courts in India held that in order to sustain a charge of defamation it was not necessary to prove that the complainant actually suffered directly or indirectly from the scandalous imputation, but that it was sufficient to show that the defendant intended or knew or had reason to believe that the imputation made by him would harm the reputation of the plaintiff (3). This is not the law and intention to defame is immaterial. It is not necessary that the defendant should have intended the defamatory statement to refer to the plaintiff. The question in each case is not whether the defendant intended any such reference, but whether any person to whom the statement was published reasonably thought that the plaintiff was the person referred to. Nor is it any defence that the defendant had no reason to suppose that any such reference

Intention to defame unnecessary.

Intention immaterial.

Even if not written to defame any one.

(1) (1910) A. C 20 (leading case), 51 A 509 : 1929 A. L. J 303 : 115 I. C 458 : A. I. R 1929 A 214, 11 L 45 : 117 I. C 90 : A. I. R 1929 L 561 (A. I. R 1929 C 69 followed), 24 I. C 749.

(2) (1929) 2 K. B 331.

(3) 28 C 63 : 5 C. W. N 819, 6 N. W 86. See 1 C. W. N 465, 7 A 906.

would be attributed to his words, or even that any such person as plaintiff existed.

The leading case.

In the leading case on the point a newspaper published an article descriptive of life in Dieppe in which one Artemus Jones described as a church warden at Peckham was accused of living with a mistress in France. The writer of the article was ignorant of the existence of any person of the name of Artemus Jones and invented the name as that of the fictitious character in his narrative. Unfortunately however it was the name of a real person, an English Barrister and journalist and those who knew him supposed the newspaper article to refer to him. It was held to be a libel (1).

Libel meant for one other than plaintiff.

Where the writer of an alleged libel has in his mind a person other than the plaintiff and what he writes is true of that other person, there too the principle laid down above is applicable. It does not matter what the writer of a libel means or intends to mean, it is sufficient if those who know the plaintiff supposed the words to refer to him (2).

Several persons of same name.

If there were several persons of the same name and if every one of them were to bring an action the defendant should be liable to each one

(1) (1910) A. C. 20.

(2) (1939) 3 All E. R 263 : 108 L. J (K. B) 618 : L. R (1939) 2 K. B 317 : 161 L. T 236: 55 T. L. R 679 : 1939 W. N 184 (affirmed by court of appeal, (1939) 4 All E. R 319 (C.A). See 37 P. L. R 670 : 157 I. C 854 : A. I. R 1935 L. 329.

of them (1). A newspaper published an announcement of engagement of a woman who was already married. In an action by the woman the defendant pleaded that he did not know anything about the plaintiff being a married woman or a virgin. It was no defence and the defendant's knowledge or ignorance was immaterial (2).

Novels and wo of fiction.

Novels and works of fiction are nowadays published with a prefatory note that the names given therein are purely imaginary and are not intended to refer to any individual. It is doubtful whether even this is any protection, since intention to defame is immaterial. See "who may sue" post.

Reference to plaintiff—the t

In order to come to the conclusion as to whether certain words and phrases refer to a particular individual or not, it is the view of the ordinary reasonable reader of the article that should be given effect to and not the opinion arrived at after a careful analysis and consideration of the article in its entirety (3). A reasonable man is one having the intelligence, knowledge, education, experience and prejudices of the average man, that is 'neither a genius, nor an idiot, fanatic or faddist, recluse, walking encyclopaedia or an illiterate', but a fair-

Reasonable ma defined.

(1) (1910) A. C 20 supra. If however the statement refers to a definite person by name, there is no libel against another man of the same name against whom it was not directed, (1925) 41 T. L. R 475. See (1910) 2 K. B 1.

(2) (1929) 2 K. B 331.

(3) 11 L 45 : 117 I. C 90 : A. I. R 1929 L 561 (A. I. R 1929 C 69 followed).

Opened by Post office.

and there is no publication, if the letter being insufficiently stamped is opened by postal authorities (1). Similarly, where a letter is addressed to the plaintiff but the plaintiff is not found and the letter is sent to the Dead Letter Office where it is opened by the postal authorities, there is no publication. The respondent sent to his wife a letter libellous of the appellant addressed in an envelope which was not pasted down. The letter was read by the wife's butler. It did not amount to publication. As laid down by Reading C. J., "it would be impossible to successfully contend that if a person, in breach of his duty, were to open a letter, and there was no reason to expect that he would commit that breach of duty, the fact that he had opened it and read it would amount to publication by the person who sent it (2)." It has further been held that when one uses a defamatory language to the person himself, the occasion is privileged, it being the common duty or interest of both to communicate and receive the same (3).

Publication presumed in certain cases.

Publication will be presumed and the burden of disproving it lies upon the defendant, in all cases in which the document, though addressed to the person himself, is so put in the way of being read and understood by some one else that it is

(1) (1915) 3 K. B 32 (38).
(2) Ibid, see also (1918) 2 K. B 677.
(3) (1939) 3 All E.R 507 supra.

probable that he actually read and understood it. Thus, it is a sufficient proof of publication to prove that a letter was posted, and therefore probably read by the person to whom it was addressed or by his clerks ; or that a post card was posted, and therefore probably read by the post office officials or by the family or servants of him to whom it was sent (1) ; or that a document was printed,and therefore published to the compositors, or that a telegram was despatched, and therefore read by the telegraph operators (2), or that the communication is made in such a way that it is overheard by the person's co-employees (3), or that the defendant got the letter written by his clerk (4), or sent it openly so that others probably read it ; or where it is known that the person's partner (5), or clerk or some other assistant (6), generally opens his letters. In such cases, as already stated, publication is presumed and it is open to the defendant to prove that there was in fact no publication (7). For instance, the defendant can prove that the post card was read by no one but the plaintiff (8), or if the matter was printed, that the printer

Illustrations.

Printed document.

Telegram.

(1) 6 M 381, (1901) 2 K. B 1, (1895) 12 T. L. R 360.

(2) (1834) 1 C. M & R 250 : 40 R.R 547 (1874) 9 C P 393. 394, (1901) 2 K. B 1.

(3) (1939) 3 All E. R 507 supra.

(4) 24 M. L. J 8 : 12 M. L. T 377 : 16 I. C 736 1 B 477. See 2 Hyde 274 : Cor. 134.

(5) (1909) 25 T. L. R 336.

(6) (1928) 1 K. B 269, (1898) 14 T. L. R 430, (1891) 1 Q. B 524.

(7) (1907) 1 K. B 371.

(8) (1915) 3 K. B 32.

which he ought to have known, is sufficient publication. For example, putting in circulation a book containing a passage defamatory of the plaintiff without taking care to know the nature of its contents (1). It is however impossible that distributing agents should be expected to read every book they had. There were some books as to which there might be a duty to examine them carefully because of their titles or the recognised propensity of their authors to scatter libels abroad. Beyond that, the matter could not go (2). On the same principle, it is sufficient publication to communicate negligently a statement known to be defamatory but not intended to be published, as when a man talking scandal to his wife negligently allows it to be overheard by a third person. The negligent statement of a defamatory matter not intended to be stated at all is sufficient publication, as where the defendants mistakenly inserted in their newspaper the name of the plaintiff's firm under heading "Bankruptcy", instead of under heading "Dissolution of partnership" (4). But if there is no negligence and no knowledge the innocent dissemination of defamatory literature does not amount to publication. Thus a newsboy is not liable for libel contained in a newspaper sold by him, as he has no

Distributing agents of books.

Newsboy selling newspaper.

(1) (1900) 2 Q. B 170.

(2) (1942) 28 T. L. R 143.

(3) (1875) L. R 10 C. P 502.

knowledge of the existence of the libel nor any negligence in failing to acquire such knowledge (1).

Publication need not be to more persons than one.

Publication does not require communication to more persons than one. It is not necessary that it should be like publication in the common acceptance of the term (2). A private and confidential communication to a single individual is sufficient (3). The communication must be without any just and reasonable cause or excuse (4). The publisher of a newspaper can publish a fair and accurate report of a parliamentary proceeding though the report is defamatory, it being privileged ; but if he republishes it, it becomes as it were a statement of his own and he will be liable (5). It is no excuse that you are merely repeating something which has been said to you by some one else. The repetition of slander heard from others is actionable unless privileged (6). And since every publication of a libel gives rise to a cause of action, several actions may be maintained in respect of the same libel, as for instance, when it is published in several newspapers. In such cases the defendant may apply under the Law of Libel Amend-

Republication of privileged report.

Repetition of slander.

Every publication actionable.

(1) (1885) 16 Q. B. D 354.

(2) 39 M 433 : 28 M. L. T 310 : 2 L.W 290 : 28 I. C 394, 7 A 205, 1 B.L.R (s.n) 12a.

(3) See (1939) 2 K. B 827, (1615) Hob. 62.

(4) See Odger on Libel and Slander.

(5) 37 C 760 : 14 C. W. N 713 : 6 I.C 81, 14 B 532 (printing defamatory statement published by another newspaper)

(6) 7 Bur L. T 253 : 27 I. C 979, 1936 A. L. J. 1014: 1936 A. W. R 943 : 165 I. C 892 : A. I. R. 1936 A 780. See 12 B 167.

ment Act, 1887 (51 & 52 Vict., c. 64, s. 5) for consolidation and joint trial of the actions when the total damages should be assessed as one sum and apportioned among the several defendants as the jury thinks fit. Under S. 6 of the same Act, the defendant may prove in mitigation of damages that the plaintiff has already recovered or received or sued for compensation in respect of any other publication of the same or a similar libel. Indeed, there is much of justice, equity and good conscience in the principle that no man shall be compensated twice or more times over for the same injury and that a newspaper libel should not be exploited to the profit of the person libelled. Where the libel is published in more than one newspaper, the person has his choice of remedy and may take it for his compensation where he wills (1).

Damages on consolidation of cases.

Summary.

So to sum up, the liability for libel is almost absolute. Intention to defame is immaterial whether in making or publishing a libel. Even inadvertent or negligent publication entails liability, and one who repeats a libel is equally liable as the author himself.

(d) That the defendant published it.

Publication by defendant.

It is last of all necessary to prove that it is the defendant who has published the defamatory statement (2). The defendant,

(1) 168 I. C 853 : A. I. R 1937 R 105.
(2) 9 M 387.

upon such proof, shall, as already observed, be liable although he may not have intended to defame the plaintiff, and although he is not the author of the libel (1). All who repeat a libellous statement are, as has also been seen (p. 63) equally liable (2). Even if he discloses the name of his informant, that will not mitigate his liability (3), but may tend to mitigate the damages (4). The person who makes an imputation and the person who publishes are alike liable (5). There is also vicarious liability for libel and the master is liable for a libel written and published by his servant within the scope of his employment (6). A newspaper is in exactly the same position as an individual for defaming (7). The proprietor of a newspaper is civilly liable for any libel which appears in its columns, even though the publication may have been

Even though he not the author.

Maker and publisher both liable.

Vicarious liability of master.

Proprietor of newspaper

(1) (1835) 112 E. R 445 : 45 R. R 711, (1875) 10 C. P 502. (1858) 175 E.R 855.

(2) (1868) 3 Q. B. D 396 (403), (1854) 156 E. R 357 : 102 R. R 478, (1887) 3 T. L. R 393, (1829) 109 R. R 448 : 34 R. R 397, (1829) 130 E. R 1112 : 30 R. R 665, (1893) 9 T. L. R 257.

(3) (1834) 172 E. R 1377, (1821) 106 E. R 1058 : 23 R. R 415.

(4) (1838) 173 E. R 470, (1859) 175 E. R 820 : 115 R. R 946.

(5) (1835) 112 E. R 445 : 45 R. R 711, (1875) 10 C. P 502, (1858) 175 E. R 855.

(6) 36 C 907 : 13 C. W. N 1165 : 3 I. C 831, 15 B 286, 10 L 816 : 117 I. C 884 : A. I. R 1929 L 129, 11 L 45 : 117 I. C 60 : A. I. R 1929 L 561, (1724) 93 E. R 136.

(7) A. I. R 1929 C 309, 41 C 1023 : 18 C. W. N 785 : 20 C. L. J 161 : 16 Bom L. R 544 : 12 A. L. J 1042 : 41 I. A 149 : 26 M. L. J 621 : 16 M. L. T 79 : 1914 M. W. N 506 : 1 L. W 461 : 7 Bur L. T 167 : 8 L. B. R 16 : 23 I. C 661 P. C., 168 I. C 853 : A. I. R 1937 R 105, 55 C 1121 : 32 C. W. N 490 : 113 I.C 834 : AIR 1929 C 69, per C. C. Ghose J (a newspaper has no privilege beyond any other member of the community in commenting on any matter of public interest and no privilege whatsoever attaches to its position ; on appeal from 54 C 73 : 101 I. C 565 : A.I. R 1927 C 297).

made in his absence, without his knowledge and even contrary to his orders, for the editor is his servant and it is within the scope of his employment to send matters for publication (1). The editor and the printer of a newspaper, and publishers of books and pamphlets are equally liable with the author for libel published, even though the editor, printer or publisher may not have known of the libel (2). See p. 61. A limited company may be indicted libel (3).

Editor, printer, publisher.

Liability of limited company for libel.

CHAPTER V.

DEFENCE IN AN ACTION FOR LIBEL.

Defences open to defendant.

There are several defences open to a person who is sued for damages for libel or slander. The usual defences may shortly be stated as below :—

Denial of authorship.

1. The defendant may deny that he made the statememt. This is a usual defence in actions for slander, because it calls upon the plaintiff to prove that the words were said, but in libel cases the

(1) 10 L. 816 : 117 I. C 884 : A. I. R 1929 L 129. See also 30 C 907 supra. But see 9 M 387. Section 2 of the Libel Act (6 & 7 Vic. c. 96) provides that in the absence of malice the editor or proprietor may avoid liability by a full and open apology in the newspaper.

(2) (1894) 2 Q. B 54, at p. 58.

(3) (1939) 2 All E. R 613 : L. R (1939) 2 K. B 395 : 160 L. T 595 : 55 T. L. R 724 : 1939 W. N 211.

defendant can generally be confronted by a written or printed document.

2. He may deny that his statement refers to the plaintiff. In effect he may say "I did not make the cap for you ; if you think it fits you that is not my fault." No reference to plaintiff.

3. He may deny that his statement is defamatory. There is no charge or imputation however serious on the face of it, which may not be explained away by evidence that in the special circumstances of the case it was not issued or understood in a defamatory sense. It may be shown to have been made in jest, or by way of irony, or in some metaphorical or secondary innocent sense and that it was or ought to have been understood in that sense by those to whom it was made. The burden of such an explanation rests upon the defendant. Not defamatory.

4. He may justify his statement on the ground that it is true. This is a complete defence if it can be proved (1). See p. 6. Justification.

5. He may allege that the statement was made upon a privileged occasion. Privilege.

6. He may claim that it was a fair comment. Fair comment.

The defendant can take any one or more of these defences, though inconsistent. Thus, a defendant who first pleads that the words complained of were not published of

(1) See 20 Bom. L. R 185 : 47 I.C 449, where the defence availabl e in a libel suit is fully discussed.

and concerning the plaintiff, can also raise the alternative plea of fair and bonafide comment. But he cannot plead the defence of fair and bonafide comment only, and then seek to show that the words were not published of and concering the plaintiff (1).

The law relating to defamation as an actionable wrong is the same in India as in England, being based on justice, equity and good conscience (2). See p. 7.

CHAPTER VI.

JUSTIFICATION.

Plea of justification.

The defence that the statement is true is termed a plea of justification, the defendant being said to justify the publication.

To be specifically pleaded.

Where a defendant wants to plead justification, he must do so specifically and distinctly (3). And as every person is presumed to be of good repute until the

Onus on defendant.

contrary is shown, the burden of proving the truth lies upon the defendant ; it is for him to prove that the statement is true, not for the plaintiff to prove that it is

(1) 37 Bom L. R 1033 : 161 I. C 769 : A. I. R 1936 B 114.

(2) 40 A 341 : 16 A. L. J 360 : 45 I. C 540 F. B., 48 C 388 : 24 C. W. N 982 : 32 C. L. J 94 : 59 I. C 143, 7 Bur L. T 253 : 27 I. C 979, 51 A 509 : 27 A. L. J 303 : 115 I. C 458 : A. I. R 1929 A 214, 8 Bur L. T 278 : 30 I. C 930, 15 N. L. J 149 : 29 N. L. R 24 : 141 I. C 362 : A.I.R 1933 N 47.

(3) 32 P. L. R 772 : 134 I. C 515 : A. I. R 1931 I, 246.

false (1). If he has made a general charge, he must prove such particulars as would establish the charge (2). The burden of proof is not shifted, nor does the presumption of good repute cease to be available in favour of the plaintiff in consequence of his having given evidence on his own behalf (3). The defence is a dangerous one, for an unsuccessful attempt to establish it may be treated as an aggravation of the original injury. If the defendant withdraws the plea of justification, the statement of fact, so far as it relates to the plaintiff, is presumed in law to be untrue (4).

Onus not shifted.

A dangerous defence.

If plea is withdrawn.

Truth of the matter alleged to be defamatory is indeed a complete answer to an action for damages (5). It is in fact the only defence that the defamatory matter is true in substance and in fact (6). For the law will not permit a man to recover damages in respect to an injury to a character which he either does not or ought not to

Truth comple defence.

(1) (1829) 34 R. R 405 : (1829) 10 B & C., p. 272, (1828) 172 E. R 507, (1829) 109 E. R 448; 34 R. R 397. Where a statement made by the defendant is per se defamatory the burden is on the defendant to prove that the allegations on which his comment was made were substantially true in fact, 117 I. C 155 : A. I. R 1929 S 172.

(2) (1846) 153 E. R 1111, (1913) 3 K. B. 499, (1908) 2 K. B 151, (1809) 127 E. R 944, (1851) 17 L. T. O. S 203.

(3) A. I. R. 1940 P 33.

(4) 36 C 883 : 13 C. W. N. 895 : 6 M. L. T 73 : 3 I. C. 224 (on appeal, 37 C 760 : 14 C. W. N 713 : 6 I. C 81).

(5) 7 L. B. R. 86 : 23 I. C 3, 7 Bur L. T 253 : 27 I.C. 979, 37 C 760 : 14 C. W. N. 713 : 6 I. C 81, 40 A 341 : 16 A. L. J 360 : 45 I. C 540 F. B (in a civil action the plea of mere truth is a good defence but in a criminal case it is not so, where to be a good defence it must be an absolute truth and made for the public good). The defendant pleading justification must cross-examine the complainant or he will not be allowed to adduce evidence, 6 A 220.

(6) 117 I. C 155 : A. I. R 1929 S 172.

Though malicious.

possess (1). This is so even though the defendant is proved to have been actuated by malicious and improper motives (2); and even though the words complained of do in fact bear a libellous meaning (3). Thus a petition to the President of a Union Board stating that a person was suffering from leprosy and therefore was not qualified for election as a member of a Local Board under section 55 of the Madras Local Boards Act, 1920, is justified if true and an action for defamation will not lie however malicious the statement might be (4). Short of truth, the maker of the statement must be liable in damages for libel or slander. Even where the statement contained only the truth, but it was incomplete and misleading, he will be liable (5). It will not do to show that the plaintiff had a general bad character evidence as to which is only admissible in mitigation of damages (6). The fact that a person was deported does not at all affect the presumption as to the character of the person (7). If there is no truth to plead, it will neither be any defence to say that there was no intention to defame (8), in as much as a statement of fact

Whole truth not stated.

Intention immaterial.

(1) (1829) 10 B & C p. 272 : 34 R. R 397, at p. 405 : 109 E. R 448.
(2) Salmond, Law of Torts, second edition, p 416.
(3) 1931 A. L. J 16 : 129 I. C 551 : A. I. R 1931 A 126.
(4) 1931 M.W.N 366 : 131 I.C 654 : A.I.R 1931 M 487.
(5) 4 B 298.
(6) 4 L 55 : 2 P. W. R 1923 : 73 I. C. 805 : A. I. R 1923 L 225. See 7 Bur L. T 155 : 24 I. C 749 (evidence giving the substance of rumour and suspicions is admissible).
(7) 36 C 883 : 13 C. W. N 895 : 6 M. L. T 73 : 3 I. C 224.
(8) 7 Bur L. T 155 : 24 I. C 749

is made at the risk of the person making it and he cannot escape liability merely because he made it honestly but without due care (1). A malicious intent or an intent to damage the reputation of a particular person is not one of the ingredients of libel or actionable slander (2). If the imputation is made in a reckless and inconsiderate manner, if means of correct information are available but they are wilfully overlooked and no enquiry is made, there arises a presumption that there can be no honest belief where there is no honest effort to arrive at the truth (3). If the statement is in fact false, it is no defence at all that the defendant honestly and on reasonable grounds believed it to be true. A rule which thus makes an innocent error the ground of serious liability is capable on occasion of working great hardship, but on the whole it is doubtless just and expedient to accept no such excuse from those who without sufficient occasion attack, however honestly, the good name of others. When on the other hand there is sufficient reason for publication, for example, some reason of duty or legitimate self interest, the defendant is exempted, as will be seen, from the rigour of this rule and is free from liability from error so long as he acts honestly and

Honestly, without due care.

Honest belief no defence.

(1) 22 L. W 26 : 85 I. C 900 : A. I. R 1925 M 950. See 4 C 124 : 3 C.L.R 122.

(2) 51 A 509 : 27 A. L. J 303 : 115 I. C 458 : A. I. R 1929 A 214, 37 Bom L. R 1033 : 161 I. C 739 : A. I. R 1936 B 114.

(3) 12 M 374 (373).

from proper motives. See 'Qualified privilege' post.

True in substance.

It is however not necessary to prove that the statement is literally true, it is sufficient if it is true in substance (1). It is true in substance if the essence of the imputation is true and if the erroneous details in no way aggravate the defamatory character of the statement or alter its nature (2). Thus a statement that the plaintiff had been convicted of travelling in a train without a ticket and had been fined one pound with three weeks' imprisonment in default of payment, was held to be sufficiently justified by proof that he had been actually fined one pound for that offence with a fortnight's imprisonment in default of payment (3). Similarly where the charge was that the plaintiff was popularising contraceptive methods which were most harmful and it was proved that some of the methods were in fact harmful, it was held to be sufficient justification (4). This is how Lord Shaw has summed it up :

Illustrations.

Lord Shaw's summing up.

"The plea (of justification) that the words were true in substance and in fact, must not be considered in a meticulous sense.....All that is required to affirm the plea is that the jury should be satisfied that

(1) (1893) 1 Q. B 571, (1837) 1 Jur. 830, (1868) 18 L. T. N. S 738, (1925) A. C 47 (78).

(2) (1925) A. C 47 (78, 79) ibid.

(3) (1865) 6 B & S 340: 122 E. R 1221.

(4) (1925) A. C 47 (78, 79) supra.

the sting of the libel, or if there were more than one, the stings of the libel should be made out. There may be mistakes here and there in what has been said, which would make no substantial difference to the quality of the alleged libel, or in the justification pleaded for it. If I write that the defendant on March 6 took a saddle from my stable and sold it the next day and pocketed the money all without notice to me, and that in my opinion he stole the saddle, and if the facts truly are found to be that the defendant did not take the saddle from the stable, but from the harness room and that he did not sell it the next day but a week afterwards, but nevertheless he did, without my konwledge or consent, sell my saddle so taken and pocketed the proceeds, then the whole sting of the libel may be justifiably affirmed by a jury notwithstanding these errors in detail"(1). But it is no justification of the statement that the plaintiff is a libellous journalist to prove that he has libelled one man, for the true meaning of the statement is that he habitually publishes libels (2). Where the statement is that the plaintiff in two mayoralties sold coal to the corporation at 8d a bushel which he had purchased at 6d, proof that in his first mayoralty this was done is not sufficient justification (3).

Not justified.

(1) (1925) A. C 47 (79) supra.
(2) (1849) 4 Ex 511 : 154 E. R 1316 : 73 R. R 736.
(3) (1833) 131 E. R 712, 761.

Where the statement is that the plaintiff had been suspended from practice three times, proof that he had only one suspension is not sufficient justification (1). Where the charge is of cruelty to a horse and of kicking out his eyes, but the latter act is not proved, it is not sufficient justification (2). Where the imputation is of a particular act, proof of some other act of like nature is not sufficient justification (3).

Imputation of particular act.

Gatley summarises the position thus :

Imputation of specific offence.

"He must justify the precise imputation complained of (4). If the words accuse the plaintiff of a specific offence, e. g., stealing a watch, it is not enough for the defendant to prove that the plaintiff was guilty of another offence, though of the same character, e. g., stealing a clock. If the words impute that the plaintiff stole a watch on a particular day, it is not enough for the defendant to prove that the plaintiff stole a watch on some other day (5). If the plaintiff is charged with seducing A, it is no justification of the charge that he seduced B, or attempted to seduce C."

Other cases.

A Head Jailor was accused by a newspaper of ordering two defenceless prisoners to be savagely beaten merely because one

(1) (1829) 130 E. R 1283, 1407 : 31 R. R 418.
(2) (1824) 107 E. R 535 : 26 R. R 515.
(3) (1915) 3 K. B 336.
(4) (1598) 78 E. R 864, (1624) 78 E. R 586, (1896) 24 R 156, (1901) 18 T. L. R 143, 763.
(5) (1915) 3 K. B 336 (339)

of them shouted out a religious phrase in the performance of his customary devotions. He sued the proprietor and editor of the newspaper for libel who pleaded justification. It was held that in order to succeed upon the plea of justification the defendants were bound to prove that the whole of the defamatory matter was substantially true. It is not enough that some of the matters set out are true, as for example it was not enough to prove that one person was in fact so beaten. The defendants having charged the plaintiff with conduct which if true would render the latter liable to criminal prosecution and having attempted to justify such a charge, the facts alleged must be proved by the defendants with the same degree of precision as would be required in a prosecution on the footing of such a charge. The benefit of any doubt as to the truth of the allegation must be given to the plaintiff and not to the defendant(1). Where the statement imputes a crime, the defendant must establish the guilt of the plaintiff beyond reasonable doubt (2). Conviction by a criminal court is prima facie evidence of guilt (3). Acquittal is no bar to a plea of justification (4). See also Pleadings, post.

Benefit of doubt to plaintiff.

Conviction or acquittal by Criminal Court.

(1) 7 L. 491 : 27 Punj L. R 812 : 99 I. C 300 ; A. I. R 1927 L 20.

(2) (1834) 172 E. R 1327, (1827) L. J. K. B 4.

(3) (1831) 109 E. R 1293 : 36 R. R 709, (1914) 3 K. B 1226.

(4) (1810) 176 E. R 545.

Defamatory rumour or report.

Where the defamatory statement is put forward by way of rumour or report, it is not sufficient justification to prove that the rumour or report really existed ; it is necessary to prove that it was true. For to give it further currency is to suggest that it may be well-founded and it is this suggestion that must be justified. Similarly, it is defamatory and actionable to publish of the plaintiff that he is suspected of some crime or other discreditable conduct ; and it is no defence to prove that such a suspicion actually existed. If this were not so then libels and slanders may be published freely by adopting the device of stating them as matters of rumour and suspicion, instead of as matters of fact (1). In short, one who publishes a defamatory statement does so at one's peril, and is liable if the statement turns out not to be true, however honestly and carefully he may have acted and however inevitable his mistake.

Justification is a question for the jury (2).

(1) (1868) L. R 3 Q. B 396, (1829) 10 B & C 263 : 34 R. R 307, (1894) 1 Q. B 671.

(2) See (1836) 132 E. R 592 : 42 R.R 680, (1837) 1 Jur 830, (1868) 18 L. T. N. S. 738.

CHAPTER VII

PRIVILEGE

Claim of privilege.

The defendant in an action for libel y also claim privilege if there is any, .t is, he can claim immunity by claiming ıt the statement was made on a privileged :asion ; and if he does so, the onus again ll lie upon him to prove affirmatively ıt the occasion was privileged (1).

Onus on plaintiff.

Meaning of privilege.

There are certain occasions or particular cumstances when any thing stated or blished relevant to the occasion or cir- nstance is free from liability. The :asion or circumstance is for that reason d to be privileged. The cases in which :vilege exists are therefore those in which ere is a just occasion for publishing a famatory matter in public interest or in e furtherance or protection of the rights lawful interests of individuals. In such ses, the exigency of the occasion amounts a lawful excuse for the attack so made ı another's reputation. This privilege is ınferred on grounds of public policy, as :herwise a free and frank dealing would : impossible being hampered by fears of ı action for libel at every step. This plea : privilege is not limited to natural per- ıns, but can be claimed by corporations (2).

Cases where privilege exists.

Genesis of privilege.

Who can raise the plea.

(1) 26 A. L. J 760 : A. I. R 1928 A 316.

(2) (1939) 2 All E. R 613 : L. R (1939) 2 K. B 395 : 160 L. T 598 : 55 L. R 724 : 1939 W. N 211.

leas of justification and rivilege.

If the defamatory statement can be shown to be true, the defence of privilege is not required, for it is allowable to publish the truth on all occasions privileged or not and from all motives good or bad. It is only when the statement is false, or cannot be proved to be true, that it is necessary to fall back upon the plea of privilege and to prove that the occasion of the publication was such as to exempt the defendant from the consequences of his error. Where privilege exists it is wise to plead it instead of, or along with a plea of justification, for, as already stated, justification is a dangerous plea. Again, although a statement may be defamatory, the publication of it may be privileged, as when a statutory body gets a resolution containing statements defamatory of a person copied by its clerk and transmits a copy under the rules to Government, the publication in both cases is privileged (1). Conversely, an imputation may be true and made for public good, but the manner of the publication may be objectionable and so not for public good and therefore not privileged (2).

Statement defamatory, but publication privileged.

Statement true, but publication not privileged.

Two kinds of privilege.

The occasions and circumstances which confer privilege are of two kinds. There are certain occasions which are absolutely privileged and there are others which carry only a qualified privilege. When

(1) 1 B 477. See 2 Hyde 274 : Cor. 134 (shown to a third person to give information which the latter ought to have).

(2) 19 B 703.

Absolute privilege.

the occasion is absolutely privileged, anything said or published on such an occasion is absolutely privileged, that is, is wholly immune from liability, irrespective of any question of malice or improper motive, and although is in fact actuated by malice or improper motive. This is absolute privilege. A suit for defamation in respect of a statement which is absolutely privileged thus will not lie even though it be actuated by malice or improper motive.

Qualified privilege.

There are certain other occasions which are also privileged, not absolutely, but on certain conditions, namely, statements made or published on such an occasion must relate strictly and fairly to the occasion and must not be actuated by malice or improper motive which is an abuse of the privilege ; so that if not fair or if actuated by malice the privilege will be destroyed. This is qualified privilege. A suit will lie for a statement to which qualified privilege attaches, on proof that although the occasion was privileged the defendant in making the statement was actuated by malice(1), and here the burden will lie on the plaintiff to prove actual malice (2). Whether a statement is privileged is a question of law for the Judge. The question for the jury is not whether the statement is privileged, but whether it was made maliciously,

Onus on plaintiff.

Malice a question of fact.

(1) (1909) 2 K. B 958, (1891) A. C 73.

so that the privilege was thereby forfeited (1).

Absolute and qualified privilege.

So in both absolute and qualified privilege, it is the occasion which confers the privilege, the difference lies in this, that whereas malice destroys qualified privilege, the other is absolute irrespective of and inspite of the presence of malice. In libel thus the question of malice arises only where the defendant takes protection under a plea of qualified privilege, see p. 35. See "Qualified privilege", post.

ABSOLUTE PRIVILEGE.

Absolute privilege attaches to judicial proceedings, legislative proceedings and state proceedings. As already stated, it is the occasion which is privileged and once the occasion is shown to exist, everything done on the occasion is protected in all circumstances and irrespective of good faith or malice. Where the statements are absolutely privileged no action will lie for them however false, defamatory and malicious they may be.

1. Judicial privilege.

Judicial privilege.

Any statement made in the course of and with reference to judicial proceedings by any Judge, Juryman, party, witness or advocate is privileged (2). It is well established that neither party, witness, counsel,

(1) (1895) 2 Q. B at p. 169, (1891) 2 Q. B at p. 345.

jury, nor Judge can be put to answer civilly or criminally for words spoken in office, so that no action for libel or slander lies whether against Judge, counsel, witenesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, even though the words were written or spoken maliciously, without any justification or excuse and from personal ill-will and anger against the person defamed (1). This absolute privilege has been conceded on grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them (2). It has thus been held that the occasion of making each of the following statements is absolutely privileged,— Genesis of the privilege.

1. Any statement by a Judge as such. Statements absolutely privileged.
2. Any statement made by a subordinate officer of a court when acting either judicially or on duty ; by a subordinate officer of a court in the

(1) 17 C. W. N 554 : 17 C. L. J 105 : 18 I. C 737, 25 C. W. N 835, 10 M 28, 17 M 87, 2 Bom L. R 3, 1 P 371 : 3 Pat L. T 276 : (1922) Pat. 85 : 66 I.C 861 : A. I. R 1922 P 104, 15 N. L. J 149 : 29 N. L. R 24 : 141 I. C 362 : A.I.R 1933 N 47 (such a suit is governed not by section 499 of the Penal Code but by the principles of justice, equity and good conscience, that is by the rules of the English Common law).

(2) (1892) 1 Q. B 451, per Lopes L. J.

course of his duty in a judicial proceeding, but not otherwise.

3. Any statement made by an Advocate as such Advocate, (including counsel, a solicitor, official receiver where he has a right of audience in judicial proceedings and a litigant in person).

4. Any statement in a pleading, affidavit, notice, summons, report, bill of indictment, information or other similar document used or prepared with a view to use in litigation, actual or contemplated.

5. Any statement by a jurror or assessor as such.

6. Any statement by a witness as such.

7. Any statement as to the subject-matter of litigation actual or potential, by a person not a party thereto, to a party or his adviser made at the request of, or with a view to assisting that party.

8. Any statement supposed or reasonably supposed to be material for the purpose, made by a person seeking legal advice or assistance, to a legal practitioner, or by such practitioner to such person in the course of and for the purpose of advising him (1).

(1) I. L. R (1943) 1 C 250 : 47 C. W. N 627.

The statement, in order to be privileged, need not be relevant, i.e., it may not have a material bearing on the matter in issue in the case, but must be made in the course of and with reference to the case, not otherwise (1). The requirements

So a Judge is not liable for acts done in good faith in the discharge of his judicial functions within the limit of his jurisdiction (2). An action for defamation cannot be maintained against him for words used by him whilst trying a case in Court, even though such words are alleged to be false, malicious and without reasonable cause (3); and he cannot be prosecuted for using insulting and defamatory language towards a witness when being examined (4), or towards a pleader in the course of the trial of a case (5). But if he acts illegally without due care and caution and beyond the Immunity of Judge. Limitations.

(1) (1868) L. R 3 Ex 220 at 222 (Judge said to the plaintiff in open court 'You are a harpy preying on the vitals of the poor), 15 N. L. J 149 : 29 N. L. R 24 : 141 I. C 362 : A. I. R 1933 N 47 (40 A 341, 48 I. C 388 referred to).

(2) 2 M. I.A 293, 7 B.L.R 449 : 16 W.R 63, 1 A 280, 39 C 953 : 16 C.W.N 865 : 16 C. L. J 231 : 10 A. L. J 193 : 14 Bom L. R 717 : 22 M. L. J 32 : 12 M. L. T 171 : 1912 M. W. N 760 : 39 I. A 163 : 16 I. C 501 P. C (reversing 36 C 433 : 13 C. W. N 458 : 9 C. L. J 298 : 5 M. L. T 367 : 2 I. C 436), 12 A 115. A mistake by a judicial officer does not render him liable for compensation, 15 W. R 506.

(3) 10 M 28, 17 M 87. See 31 M 400, 26 C 852; 3 C.W.N 539.

(4) 1934 A. L. J 1173 : 3 A. W. R 683 : A. I. R 1934 A 827.

(5) 26 C 852 : 3 C. W. N. 539 (dissenting from 9 M 439), 2 B 481, 7 B 61. Where the defendant, a judicial officer, served a notice upon a pleader for certain statements made by the latter in an application, and the pleader sued the judicial officer for alleged libellous matter contained in the notice, it was held that the officer was protected by section 1 of the Judicial Officers' Protection Act, XVIII of 1850 and that the suit was not maintainable, 45 B 1089 : 23 Bom L. R 447 : 62 I. C 93.

limits of his jurisdiction, he loses the protection and a suit for damages will lie against him (1). Thus a Judge who from the Bench made a defamatory observation in respect of some entirely extraneous matter is not to be regarded any longer as speaking in his capacity as a Judge and will not be protected (2). The privilege extends to all Courts superior and inferior, civil and military (3). But it does not apply to officials possessing merely administrative as opposed to properly judicial functions, and it makes no difference that in the performance of those administrative functions they exercise a judicial discretion (4). The privilege thus does not attach to a registering officer who is not a court (5), nor to commissioners exercising administrative functions, who do not either constitute a court (6). While purporting to act under his commission a commissioner under the Combined Investigation Act spoke certain

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(1) 14 B. L. R 254 : 21 W. R 391 (affirming 21 W. R 120), 9 C 341 : 13 C. L. R 185 P. C., 2 B. H. C. R 407, 3 B. H. C. R 1, 36, 47, 4 B. H. C. R 150, 30 B 241, 7 Bom L. R 951, 5 M. H. C. C 345, 6 M. H. C. C. 423, 1 M 89, 10 M. L. J 232.

(2) (1876) 2 C. P. D. p. 56, (1883) 11 Q. B. D 588.

(3) (1868) L.R 3 Ex. 220 (County Court), (1862) 2 B & S 475 (Coroner), (1899) 1 Q. B. 455 (Justice of the peace), (1873) L. R. 8 Q. B. 255 (Court Martial), (1906) 1 K.B. 487 (Magistrate), (1908) 1 K.B. 584 (Official Receiver reporting on the winding up of a company), (1909) 2 K.B. 306 (same). The same privilege protects statements made before a select committee of Parliament, (1880) 6 Q.B.D. 307.

(4) Thus a meeting of the London County Council engaged in hearing applications for music and dancing licenses is not a Court within the meaning of the rule and statements made by a member of that body are not absolutely privileged, (1892) 1 Q.B. 431.

(5) 23 M.L.J. 50 : 1912 M.W.N. 473 : 15 I.C. 652.

(6) 1935 A.L.J. 37 : 1935 M.W.N. 40 : 41 L.W. 86 : 113 I.C. 908 : A.I.R. 1935 P.C. 3.

words (and published them to seven other persons), concerning the plaintiff, a barrister, which were defamatory. In an action for defamation, the commissioner pleaded privilege. It was held that the commissioner while investigating only acts as part of an administrative machinery for enquiring whether offences had been committed and the fact that the commissioner is empowered to enter premises and examine books, papers and records of suspected persons shows how far his functions differ from those of a Judge and so there was no privilege (1). The absolute privilege which is given to words spoken by a Judge was originally intended for the protection of Judges sitting in recognised courts of justice established as such. The doctrine has been extended to tribunals exercising functions equivalent to those of an established court of justice. But it has no application to Commissioners exercising merely administrative functions and other administrative officers exercising similar duties (2).

Tribunals.

This privilege extends not merely to Judges (3), but to Advocates (4), witnesses (5), and parties (6). It includes not merely statements made by a witness in

Privilege extends to parties, Advocates, witness.

(1) (1935) A.C. 76 : 104 L.J. (P.C.) 21 : 152 L.T. 289.

(2) 1935 A.L.J. 37 : 1935 M.W.N. 40 : 41 L.W. 86 : 153 I.C. 908 ; A.I.R 1935 P.C. 3, supra.

(3) (1868) L.R. 3 Ex. 220 (leading case), 1934 A.L.J. 1173 : A.I.R. 1934 A 827.

(4) (1883) 11 Q.B.D. 588.

(5) (1876) 2 C.P.D. 53, (1905) 1 K.B. 504.

(6) (1899) 1 Q.B. 455.

Court, but also statements made by him to a party, or to the party's solicitor, in the course of preparation for trial (1). A communication by a party to his solicitor or legal adviser made in connection with a judicial proceeding, or in connection with a necessary step preliminary thereto, or with reference to an act incidental to the proper iniciation thereof, is absolutely privileged (2). The defendant had lent money to the plaintiff to enable the latter to purchase and carry on a hotel. Subsequently, differences arose between them as to what security should be given for the loan and as to the time when the loan should be repaid. The defendant consulted her solicitors and wrote certain letters to them which had reference to business capacity, character and financial position of the plaintiff. The plaintiff sued the defendant for libel contained in the letters. The communications between the defendant and her solicitors were absolutely privileged and no suit lay (3). Communications made to a solicitor with a view to, and for the purpose of retaining the solicitor are privileged, even though the solicitor does not accept the retainer (4),

ommunications etween witness, olicitor and ient.

(1) (1905) A.C. 480, 49 M 315 : 50 M.L.J. 460 : 23 L.W. 327 : 93 I.C. 8 : A.I.R. 1926 M 521.

(2) 46 L.W. 932 : 1937 M.W.N. 1109 (statement made by a party instructing his legal adviser to reply to a notice received by him is not absolutely privileged, but has a qualified privilege).

(3) (1928) 2 K.B. 520.

(4) (1929) 1 K.B. 655 : 141 L.T. 140.

but not otherwise (1). Similarly, where counsel gave contents of the written statement containing an alleged defamatory matter, to his client, or to his own clerk, or to the clerk of another Counsel engaged with him in the case, or to a friend or helper of his client, or to pleaders in the Bar Library who wanted to see out of curiosity or for the point of law involved, it was in the course of judicial proceeding and was absolutely privileged (2). That is to say, generally speaking no suit lies for defamatory statements made in the course of judicial proceedings which are absolutely privileged (3). Communications in course of judicial proceedings.

The privilege extends to an advocate while conducting a case and statements made by him while so engaged are absolutely privileged (4). A suit for damages against a pleader for words used during arguments is not maintainable (5). A pleader or a mukhtear is not liable, if relying on the statement of his client, he in good faith introduced defamatory matter Immunity of advocate. In argument. For pleadings.

(1) (1930) A.C. 558.

(2) 32 P.L.R. 772 ; 134 I.C. 515 : A.I.R. 1931 L 246.

(3) 2 R 333 : 84 I.C. 977 : A.I.R. 1925 R 15, 6 W.R. 134, 17 W.R. 283 : 11 B.L.R. 321 P.C., 15 C 264, 27 C 262, 17 B 127, 573, 19 B 717, 25 B 230 : 2 Bom L.R. 244, 10 A 425, 29 A 685 : 4 A.L.J. 605, 10 M 87, 11 M 477, 16 M 265, 28 M 464, 30 M 222, 14 B 97, 55 C 85, 41 C 514, 50 B 162, 47 B 15, 49 M 728, 3 R 524 : 92 I.C. 737 : A.I.R. 1925 R 345. Where at a trial one party told the Court in good faith that the other party was tampering with the witnesses, there was no libel, 9 B 269. But where a party intervened in the examination of a witness and made a defamatory statement as to his character, it was not in the ordinary course of the proceedings and the party was liable, 15 M 414. See 11 W.R. 534.

(4) (1882) 11 Q.B.D. 588 (advocate used expressions suggesting that the plaintiff was accustomed to keep and use drugs for immoral purposes).

(5) 1 P 371 : 3 Pat. L.T 276 : (1922) Pat. 85 : 66 I.C 861 : AIR 1922 P 104.

in the pleadings (1). Where a vakil in the course of his argument described the plaintiff as a liar and a swindler, an action for damages against him was not maintainable (2). Where a pleader called the witnesses for the prosecution loafers, it was held that the statement was privileged (3). A pleader under instruction from his client asked a witness of the other party whether his daughter had given birth to a child without marriage. The question was privileged (4). So an advocate cannot be proceeded against civilly or criminally for defamatory words uttered in his office as advocate, in the course of any judicial proceeding with reference thereto, even though unnecessary to support and irrelevant to his client's case and uttered without justification or excuse. He is absolutely privileged for words spoken, and the question of malice, bonafide or relevancy cannot be raised (5).

or questions put witness.

Immunity based on public policy.

On grounds of public policy, an advocate, acting professionally in a cause, is

(1) 2 N.W. 473.

(2) 1 P 371 : 3 Pat. L.T. 276 : (1922) Pat. 85 : 66 I.C. 861 : A.I.R 1922 P 104, 36 C 375 : 13 C.W.N. 340 : 9 C.L.J. 259 ; 1 I.C. 147, 19 B 340. Where a pleader argued that certain papers filed by the plaintiff were fraudulent and forged, it having transpired that in a previous suit by the plaintiff's husband the collection papers filed were held to be manufactured, he acted within his duty by the client, 25 C.W.N. 835 : 66 I.C. 604.

(3) 19 B 340.

(4) A.I.R. 1937 R 535 (client too was privileged as the instruction was in course of judicial proceedings).

(5) 19 B 340, 10 M 28, 48 C 388 : 24 C.W.N. 982 : 32 C.L.J. 94 : 59 I.C. 143, 7 Pat. L.T. 608, 1 P 371 : 3 P.L.J. 276 : (1922) Pat. 85 : 66 I.C. 861 : A.I.R. 1922 P 104, (1876) 1 C.P.D.S. 40, (1882) 11 Q.B. 588. See Odgers on Libel, 4th Edition, p. 225, also 8 Bom. Cr. 126.

absolutely protected against a suit for defamation for words spoken or written in his professional capacity in the course of the administration of law in respect of that cause, even though the words are uttered without justification and maliciously and are irrelevant to any issue then before the court. But it cannot be said that there is no limit to the immunity of an advocate from the consequences of his words and acts in the cause he conducts. There comes a point at which 'irrelevance' takes him outside his office altogether, when that point is reached he ceases to be an advocate altogether. At what point that stage is reached in any particular case must necessarily vary with the facts of each case. But until it has been shown that what an advocate says and writes in the course of the administration of a suit is not said or written 'in reference to that suit' and is in that broad sense 'irrelevant', it has to be held in his client's interest rather than in his own that he enjoys an absolute privilege. At least a prima facie case of irrelevance in the wide sense must be shown against him before his conduct can even be enquired into in a court of law. When however irrelevance in the proper sense is established, then the absolute privilege of the advocate ceases (1). In fact a member of the Bar in this country has no absolute

Limit to immunity.

When absolute privilege may cease.

(1) I.L.R. (1945) A 702 : 1946 A.L.J. 62 : 1946 A.L.W 398 : 1946 A.W.R 354 : A.I.R 1946 A 213.

he true position.

privilege. An advocate who makes defamatory statements in the conduct of a case has no wider protection than a lay man ; that is to say, he has to bring his case within the terms of section 499 of the Indian Penal Code and under section 105 of the Indian Evidence Act. The burden of proof would naturally be on him. But in practice the Courts have held that an advocate is entitled to special protection and if an Advocate is called in question in respect of defamatory statements made by him in the course of his duties as an advocate, the court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice ; i.e. unless it appears that the statements were made wantonly or from malice, or from private grudge, he will not be liable for defamation (1). So unless malice is imputed a pleader speaking under instruction is not liable for any defamatory statement. He is not only justified but is bound to state his client's defence and is not limited to the record in trying to furnish an explanation of the evidence which is consistent with his client's case (2).

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ution.

An advocate ought to be cautious about making defamatory statements, particularly about people who are not parties or witnesses, on the strength of instructions

(1) 34 Bom. L.R 910 ; 139 I.C 275 : A.I.R 1932 B 490.
(2) 3 S L.R. 177 : 4 I.C. 176.

which he has had no time to verify ; and if he has been misled into making such statements which turns out to be untrue, it is his duty to withdraw the statements as soon as it is shown to be untrue, or take the consequences like any other individual (1). So defamatory statements made by an advocate outside the scope of his duty as advocate and with no reference to the subject before the court are irrelevant and so are necessarily made in bad faith for which counsel may be proceeded against in an action for defamation. Thus where a counsel examining a witness asked whether the company he represented was not the biggest in the town, the witness said 'yes', and the pleader on the opposite side remarked 'and it is also the most dishonest in the town', the remark was defamatory of the company, being irrelevant with no reference to the subject before the court and was outside the pleader's duty as an advocate, so that the latter might be proceeded against for that in an action for defamation (2). Illustration.

Absoluate immunity attaches to questions put by an accused person in good faith for the purpose of defending himself (3). Immunity to questions put by accused person.

(1) 34 Bom. L.R. 910 : 139 I.C. 275 : A.I.R. 1932 B 490 supra.

(2) 51 A 509 : 27 A.L.J. 303 : 115 I.C. 458 : A.I.R. 1929 A 214, 54 C 137 : 101 I.C. 600 : A.I.R. 1927 C 303, 55 C 85 : 46 C.L.J. 227 : 104 I.C. 717 : A.I.R. 1927 C 823, 56 M.L.J. 570, 29 L.W. 210. See 15 N.L.J. 149 : 29 N.L.R. 24 : 141 I.C. 362 : A.I.R. 1933 N 47.

(3) 31 M 400. See 48 C 388 : 24 C.W.N. 982 : 32 C.L.J. 94 : 59 I.C. 143.

Immunity of witness.

A witness is not liable to be sued for damages for evidence given on oath in court (1). A witness is absolutely privileged in regard to anything he says in the witness box provided it has reference to the enquiry, though it may not be legally relevant (2). Where a witness is compelled to answer a question put to him by the Judge under section 132 of the Indian Evidence Act, he is protected (3), also when insinuating questions are put to him and he gives answers (4). The same absolute privilege attaches to affidavits sworn as evidence, as it does not differ from evidence given in the box (5). It is of greater importance in the public interest that witnesses should be absolutely protected in giving evidence, than that persons to whom they may have referred and about whom they may make mistake or even tell lies, should have the protection of being able to sue them for damages. So statements made by witnesses in Court relevant to the proceedings are absolutely protected. Whether the statements were true or untrue makes no difference, though untruth to the

Of affidavits.

(1) 17 W.R.P.C. 283 : 11 B.L.R. 321 P.C., 14 B 97, 25 B 230 : 2 Bom. L.R. 244 (even if false), 10 M 87, 11 M 477, 17 B 127, 573, 27 C 262, 154 I C. 535 ; A.I.R. 4935 R 30. But see I.L.R. 1937 N 425 : 20 N.L.J. 33 : 169 I.C. 429 : A.I.R. 1937 N 138 contra. There is no privilege if the evidence is not given in a Court, but at an official inquiry, 19 B 51.

(2) (1876) 2 C.P.D. 53, (1905) 1 K.B. 504. See 38 L.W. 240 : 144 I.C 115 : A.I.R. 1933 M 537, I.L.R (1939) 1 C 574 : 43 C.W.N 775 : 184 I.C 637 : A.I.R 1939 C 477.

(3) 18 A.L.J 112 : 54 I.C 890, 30 M 222.

(4) 10 M.L.T 489 : 12 I.C 954.

(5) 21 M.L.J 85 : 8 M.L.T 55 : 1910 M.W.N 155 : 6 I.C 309. See 2 M 13.

knowledge of the witness would undoubtedly render him liable to proceedings for perjury (1). But a voluntary and irrelevant statement made by a witness maliciously is not privleged (2). So before deciding whether a statement made by a witness amounts to defamation, it should be found out whether such statement was relevant to the enquiry (3). So also a party to a suit will be liable, if, asked by counsel, he makes a defamatory statement wholly irrelevant and not called for by the question (4).

Witness when not privileged.

Where an accused in a criminal prosecution made defamatory statements in answer to questions put to him by court, he was privileged in view of s. 342 Cr. P. C. (5).

Immunity of accused in criminal case.

No action lies against a person for what he states to questions put to him by a police officer conducting an investigation under the Criminal Procedure Code (6). It is to be noted in this connection that judicial proceedings do not start with the report of a crime to the police, and police investi-

Witnesses examined at police investigation.

(1) 96 I.C 89 : A.I.R 1926 A 672 (40 A 341 followed).

(2) (1929) 46 T.L.R 448, 51 A 509 supra, 47 B 15 : 24 Bom. L.R 400 : 69 I.C 94 : A.I.R 1922 B 381, 15 C 264, 32 C 756 : 9 C.W.N 911 : 2 C.L.J 105, 32 C 1060 : 9 C.W.N 847 : 2 C.L.J 396, 4 C.L.J 390, 10 A 425, 5 A.W.N 301, 11 A.L.J 193 : 18 I.C 331, 39 P.R 1868, 16 P.R 1879, 146 P.R 1879, 27 P.L.R 351 : 8 L.L.J 150 : 99 I.C 751 : A.I.R 1926 L 486. See 29 A 685.

(3) 11 A.L.J 193 : 18 I.C 331.

(4) 8 L.L.J 150 : 27 Punj. L.R 351 : 99 I.C 751 : A.I.R 1926 L 486.

(5) 25 A.L.J 855 : A.I.R 1927 A 707.

(6) 28 C 794 : 5 C.W.N 804, 16 M 235, 49 M 315 : 50 M.L.J 460 : 23 L.W 327 : 93 I.C 8 : A.I.R 1926 M 521 (such person is a potential witness and all statements made by a potential witness as a preliminary to going into the witness box are equally privileged statements as when made actually in the witness box ; per Couts Trotter, C.J.). See 7 L.B.R 64. See also 23 Mys L.J 166.

gation following such report is not any part of the judicial proceedings which start only when the police after making investigation move the court to start a prosecution; so that any statement made to the police at such investigation carries only a qualified privilege which is destroyed by the existence of malice (1). But where a Magistrate directs the police under section 202 Criminal Procedure Code to enquire into and report on a complaint, he is exercising a power which does not exist in England and a statement to the police when they are acting in pursuance of the direction is absolutely privileged. The police are for the time being the delegates of a judicial authority and their investigation is to be considered as part of a judicial proceeding (2). Statements made by a person to the police in the course of an investigation under sections 174 and 175 Mysore Criminal Procedure Code are absolutely privileged and cannot be made the foundation of a charge for defamation, because the witness making the statement is compellable under the law to make the statements on oath. The fact that the statements are made in writing would not make them any the less statements made in answer to questions put during the course of the investigation or inquest (3).

Ordinarily a qualified privilege.

Where privilege absolute.

Law in Mysore.

(1) 1942 A.L.W 696.

(2) I.L.R (1943) 1 C 250 : 47 C.W.N 627. See however I.L.R 1943 B 178 : 45 Bom. L.R 215 : 208 I.C 167 : A.I.R 1943 B 167.

(3) 23 Mys L.J 166 : 50 Mys H.C.R 64.

Immunity of party.

No party to an action whether civil or criminal will render himself liable for defamation in respect of any statement made by him in any pleading, i.e., plaint, written statement, complaint, affidavit, answer to interrogatories, or made by him while conducting his case in person though such statement, whomsoever it may refer to, be false, malicious and irrelevant to the matter in issue (1). So statements in pleadings are absolutely privileged (2). The defendant, a Headmaster, was sued for damages for wrongful dismissal by a teacher. The defendant filed extracts from a report made by him to the School Managing Committee, as he thought it necessary for the purpose of his defence to show the grounds upon which the plaintiff was dismissed by the committee. The extracts were found to be defamatory of the plaintiff. The plaintiff filed a suit for damages for libel. It was held that the occasion was one of absolute privilege as the statements were made in Court in the course and for the purpose of defence. Whether or not writs, pleadings, and affidavits were governed by the law of absolute privilege would depend upon the nature of the statements and the purpose for which they

Pleadings.

(1) Gately p. 198, (1899) 1 Q.B 435, (1859) 157 E.R 964 : 118 R.R 619, (1759) 97 E.R 572, 806.

(2) 14 B 97, 37 M 110 : 14 I.C 757, 31 M 400, 15 N.L.J 149 : 141 I.C 862; A.I.R 1928 N 47, 11 P 693 : 14 Pat. L.T 279 : 141 I.C 133 : A.I.R 1933 P 25, 2 R 333 ; 84 I.C 977: A.I.R 1925 R 15, 154 I.C 535 : A.I.R 1935 R 30.

Documents put in as evidence.

were filed. If they are documents considered by a party as essential for his defence they are absolutely privileged (1). So in a civil action for damages there is absolute privilege for a statement made in a pleading provided that the statement has reference to the enquiry. The words 'reference to the enquiry' should be given a very wide and comprehensive application and the court should not take a too restricted view of what is pertinent, but where the statement is entirely irrelevant to the inquiry the privilege is lost (2). There are some cases in which the contrary opinion has been expressed, namely, that defamatory statements in pleadings are not absolutely privileged, but carry only a qualified privilege and may form the foundation of a suit for damages for libel (3), it being added that the fact that the suit in which the defamatory statements were made has been settled by compromise is by itself no bar to the maintainability of an action for damages (4). Statements made by parties to a suit in an application made to the Court during the pendency of the suit are absolutely privileged (5).

Contrary view.

Statement in application to Court.

(1) 55 L.W 111 : (1942) 1 M.L.J 247 : 1942 N.W.N 155 : 205 I.C 516 : A.I.R 1942 M 343.

(2) I.L.R 1943 M 685 : (1943) 1 M.L.J 186 : 1943 M.W.N 138 : 56 L.W 114 : 209 I.C 232 : A.I.R 1943 M 350, 38 L.W 240 : 144 I.C 115 : A.I.R 1933 M 537 (statement in answer to an application under S. 74 of the Madras Estates Land Act).

(3) 5 C.W.N 293, 15 C.W.N 995 : 14 C.L.J 31 : 7 I.C 803, 65 I.C 201, 23 C 867, 17 C.W.N 554 : 17 C.L.J 105, 18 I.C 737, 65 I.C 214, 21 O.C 321 : 6 O.L.J 26 : 49 I.C 58. See 14 W.R.Cr 27, 48 C 388 : 59 I.C 143 : A.I.R 1921 C 1.

(4) 21 O.C 321 : 6 O.L.J 26 : 49 I.C 58, ibid.

(5) 118 I.C 657 : A.I.R 1929 A 972.

Similariy, defamatory words used in a complaint to a magistrate are absolutely privileged (1). And statements made in a complaint even to a police officer are absolutely privileged, for such statements could only be made with a view to their being repeated on oath before the magistrate (2). A complaint to a police officer is, from its very nature, a statement which the complainant is prepared later, if called upon, to substantiate on oath and so is absolutely privileged. The plaintiff took some diamonds from the defendants, a firm of jewellers, on approval in April, 1936. On 25. 5. 1936 the defendants presented him with an invoice for the price. The diamonds were not paid for. On 27. 9. 1936 the defendants sent a letter to the Inspector of police which the plaintiff alleged was defamatory, as being equivalent to a charge against him of criminal breach of trust. In

Complaint to Magistrate.

Complaint to Police.

(1) 40 A 341 : 16 A.L.J 360 : 45 I. C 540 F. B (overruling 3 A 815), 26 A.L.J 760 : 115 I.C 119 : A.I.R 1928 A 316, 100 I.C 31 : A.I.R 1927 A 817, I.L.R 1940 N 48 : 1940 N.L.J 99 : 187 I.C 764 : A.I.R 1940 N 125, 53 L.W 238 : 1941 M.W.N 226 : (1941) 1 M.L.J 200 : 198 I.C 338 : A.I.R 1941 M 539, (1918) 3 U.B.R 88 : 47 I.C 674 (if the complaint is dismissed the person complained against may sue him for damages for malicious prosecution), 37 M 110, 11 P 693 (48 C 388 referred to), 49 M 315 : 50 M.L.J 460 : 23 L.W 327 : 93 I.C 8 : A.I.R 1926 M 521 (a defamatory statement in a petition to a Magistrate to take action under s. 107 Cr.P.C. is absolutely privileged as the petition initiates a proceeding and falls within the information contemplated by sub-section (1) of the said section). See 22 A 234 : 1900 A.W.N 46. But see 2 N.W 473 (the pleading must be in good faith).

(2) 53 L.W 238 : 1941 M.W.N 226 : (1941) 1 M.L.J 200 : 198 I. C 338 : A.I.R 1941 M 538. See 50 Mys H.C.R. 204 (statement in complaint to police praying for taking security for good behaviour, if made bona-fide with an honest belief in the truth of what is stated, is privileged, whether the statement in itself be true or false).

a suit by the plaintiff for damages it was held that the letter in question was absolutely privileged (1). The immunity which attaches to statements made in judicial proceedings, also attaches to statements made on occasions leading to judicial proceedings. Consequently, no action for damages for defamation will lie in respect of defamatory statements made by the defendant against the plaintiff in his report to the police, or in the criminal proceedings which he started subsequent to the report, such statements being absolutely privileged (2).

casions leading judicial proedings.

port to Police.

Statements made at quasi judicial proceedings before special tribunals by parties, witnesses, judges or advocates are similarly absolutely privileged, provided the tribunal is recognised by law and exercises judicial functions, though not a court in the ordinary sense of the term. Thus proceedings before a commission of enquiry or before an officer under section 75, Madras Estates Land Act are quasi judicial and statements made before such an officer are privileged (3). It has however been held that a body called the Court of Referees constituted under the Unemployment Insurance Act of 1921 to decide disputes as to unemployment benefits

tements at asi judicial oceedings.

ore Court of ferees.

(1) I.L.R 1941 M 332 : 1940 M.W.N 1054 : (1940) 2 M.L.J 556 : 52 L.W 519 : 195 I.C 24 : A.I.R 1941 M 26.

(2) I.L.R (1939) 1 C 574 : 43 C.W.N 775 : 184 I.C 637 : A.I.R 1939 C 477 (the provisions of the Penal Code should not be taken as the criterion for determining as to what should be the extent of the privilege).

(3) 38 L.W 240 : 144 I.C 115 : A I.R 1933 M 537. Proceedings before a Bar Council would likewise be privileged.

on a reference by the insurance officers, merely discharged administrative duties, and so a letter containing a libel addressed to that body is not absolutely privileged (1).

before Private Tribunals.

Private tribunals deriving authority solely from the submission or consent of parties have no such privilege attaching to their proceedings. Thus a meeting of the London County Council engaged in hearing applications for music and dancing licenses is not a court within the meaning of the rule and statements made by a member of that body are not absolutely privileged (2).

in petition to Hig Court against Advocate.

Statements in a petition and affidavit sent to the High Court by a municipality for taking action against an advocate under the Bar Councils Act are absolutely privileged (3).

Reports of judic proceedings.

Fair, accurate, and contemporaneous reports of public judicial proceedings published in a newspaper are privileged. A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged (4). If any of the conditions are absent, a report of judicial proceedings falls within the rule of common

(1) (1927) 2 K.B 378 (it is in all cases necessary to bring to bear a judicial mind in the performance of such duties, which therefore makes no difference).

(2) (1892) 1 Q. B 431.

(3) I.L.R 1944 B 222 : 46 Bom L.R 417 : 219 I.C 199 : A.I.R 1944 B 246.

(4) 28 M 464. See 51 & 52 Vict., c. 64, s 3.

istration.

law and possesses at the most a merely qualified privilege (1). During the hearing of a libel action, counsel for the plaintiff criticised the behaviour of one Mr. D very severely in his opening speech and the plaintiff also in his evidence commented adversely upon Mr. D's behaviour. Thereupon Mr. D made an application to the Judge in these words : "May I make an application. I am the rector of S and I want to contradict the many lies that have been told in the court." This was reported in newspapers. The plaintiff filed a suit against the proprietors of the newspapers for libel for reporting this matter which was defamatory of him. It was admitted to be a fair and accurate report. It was held that the application which Mr. D made to the court was made in the course of the proceedings publicly heard before a court exercising judicial authority and the reports were fair and accurate reports of those proceedings and so were protected by section 3 of the Law of Libel Amendment Act, 1883. which provides that 'a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneuosly with such proceedings, be privileged' (2).

(1) (1878) 3 C.P.D 319, (1893) 1 Q.B 65, (1889) 14 A. C 194. cf. (1889) 23 Q.B.D 400.

(2) (1937) 1 K. B 728 : 106 L.J (K.B) 292 : 156 L. T 403.

II. Legislative Privilege.

Any statement made in parliament by a member of either house is privileged. Statements made by members of either House of Parliament in their places in the house, though they might be untrue to their knowledge cannot be made the foundation of civil or criminal proceedings however injurious they might be to the interest of a third person (1). The privilege is strictly confined to the floors of the Houses of Parliament and does not extend outside, not even to the lobbies, the smoking room or the visitors' gallery (2). Similar absolute privilege attaches to the proceedings of the Federal and Provincial Legislatures under the Government of India Act, 1935 (Chapter 42, sections 28 and 71).

Statement of member in Parliament.

of member in Indian legislatures.

Any republication by any person in full of parliamentary papers published by the driection of either House is privileged (3). By the Parliamentary Papers Act, 1840, absolute privilege is conferred upon the publication, by order of either House of Parliament, of the reports, papers, votes, or proceedings of either House and also upon the republication in full of any documents of this nature which have already been published by such authority. The first publication of a defamatory parliamentary

Publication of Parliamentary papers.

of votes and proceedings.

(1) (1869) L. R 4 Q. B 576.

(2) (1901) 18 T. L. R 143.

(3) If not full, it will carry only a qualified privilege, (1909) 2 K.B 958.

report thus is privileged (1),—it must be a fair and accurate report of the proceedings (2). So that the publisher of a newspaper can publish a fair and accurate report of a parliamentary proceeding though the report is defamatory which is privileged, but if he republishes it, it becomes as it were a statement of his own and he will be liable in damages (3). Similarly, official reports of the proceedings of the Indian Legislatures Federal and provincial, are privileged under the Government of India Act, 1935, and their first publication in newspapers is privileged.

III. State Privilege.

tatement by ficer of state.

Any statement made by one officer of state to another in the course of his official duty is privileged. It is not competent to a civil court to entertain a suit in respect of the action of an official of state in making such a communication to another official in the course of his official duty, or to enquire whether or not he acted maliciously in making it (4). Thus an official communication made by the Secretary of State for India to the Under Secretary for the purpose of enabling the latter to answer a question in the House of Commons is absolutely privileged (5).

(1) 37 C 760 : 14 C.W.N 713 : 6 I.C 81.

(2) 36 C 883 : 13 C.W.N 895 : 6 L.M.T 73 : 3 I.C 224 (on appeal 37 C 760 : 14 C.W.N 713 : 6 I.C 81).

(3) 37 C 760 ibid, 14 B 532 (printing defamatory statement published by another newspaper). See Publication,

(4) (1895) 2 Q. B 189.

(5) Ibid.

A suit does not lie against the crown for damages for defamation (1). A suit on a libel however malicious contained in a Government resolution is not maintainable (2). A libellous statement made by the Government in an order passed on appeal is absolutely privileged (3). Defamatory words published by the Governor-General in the course of official duties are likewise privileged (4). The entry of a person's name in the serveillance register without justification does not afford ground for an action for defamation (5). Where under the authority of the Raja of Cochin an enquiry was held into the plaintiff's moral character, as a result of which his excommunication from a temple was ordered and the order was sent by the Raja's agent to the superintendent of the temple who made it over to the defendant, who communicated it to the manager of the temple, the defendant, it was held, was absolutely privileged (6). Where however the consul of a foreign state wrote some defamatory letters to his government, reflecting on the character of a commercial house in Calcutta, the communications were not privileged (7).

No suit against crown.

Government resolution.

Government order on appeal.

Governor-General's order.

Entry in serveillance register.

Foreign consul's communications.

(1) 18 C.W N 106 : 17 C.L.J 75 : 16 I.C 922.

(2) 27 B 189 : 5 Bom L. R 30 (on appeal 6 Bom L.R 131).

(3) 37 M 55 : 24 M.L.J 429 : 1913 M.W.N 758 : 19 I.C 353 (the occasion is at least one of qualified privilege).

(4) 39 M 781 : 29 M.L.J 280 : 31 I.C 224.

(5) 2 Pat L.T 176 : (1921) Pat 48 : 51 I.C 905.

(6) 39 M 433 : 28 M.L.J 310 : 2 L.W 290 : 28 I.C 394.

(7) 1 Ind. Jur. N.S 192.

QUALIFIED PRIVILEGE.

As in absolute privilege, in qualified privilege too, it is the occasion that is privileged but, unlike absolute privilege, it depends upon how that occasion has been used and malice will destory the privilege. Three elements thus must co-exist to make it a case of qualified privilege, namely,

Malice destroys privilege.

Essential conditions.

(i) there must be a fit occasion to make the statement ;

(ii) the statement must not be uncalled for, but must have reference to the occasion ; and

(iii) it must be made from right motives, not from malice (1).

If the libellous statement is made in such circumstances co-existing, then only (this is the qualification) the person making it will be protected, otherwise not. Malice means the presence of an improper motive. A statement is malicious when it is made for some purpose other than the purpose for which the law confers the privilege of making it. If the occasion is privileged, it is so for some reason and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive (2).

Malice.

Malicious statement.

(1) 9 O & A.L.R 302 : 79 I.C 57 : A.I.R 1923 O 247.

(2) (1877) 3 Q.B.D p. 246 (per Brett L.J). See also (1895) 2 Q.B p. 171, (1892) 1 Q.B p. 454.

Reasonable and probable cause. unnecessary.

It is not necessary that the statement was made without reasonable and probable cause, for if the statement is made maliciously, and is in fact false, the defendant is liable although he had good grounds for believing it to be true. The unreasonableness of the defendant's belief may amount to evidence of malice (1). The Mysore Court has held the contrary, that so long as the statements are made bonafide, that is, with an honest and fairly grounded belief in the truth of what is stated, they are privileged whether the statements in themselves be true or false (2). The law requires that a privilege should be used honestly but not that it shall be used carefully. Negligence in making defamatory statements on a privileged occasion thus is not actionable (3).

Negligent statement.

Onus on defendant to prove privilege.

The onus in the first instance is upon the defendant to prove that the privilege exists (4). If the defendant proves that the occasion was privileged, it will then lie upon the plaintiff to prove actual malice on the part of the defendant (5), for malice destroys the privilege (6), and leaves the defendant subject to the ordinary law by

Onus on plaintiff to prove malice.

(1) (1802) 1 Q.B p. 454.

(2) 50 Mys H.C.R 204.

(3) (1877) 3 Q.B.D 244, (1891) 1 Q.B 474.

(4) 17 Pat L.T 816 : 162 I.C 809 : A.I.R 1936 P 309.

(5) 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114, 7 L.B.R 64 : 22 I.C. 273, 8 Bur L.T 278 : 30 I.C 930, 6 Bur L.T 100 : 20 I.C 293, 24 M.L.J 8 : 12 M.L.T 377 : 16 I.C 736, 26 A.L.J 760 : A.I.R 1928 A 316. See 83 P.R 1908 : 152 P.W.R 1908 : 26 P.L.R 1909 : 4 I.C 918, 73 I.C. 39 : A.I.R 1923 N 226. See 117 I.C 155 : A.I.R 1929 S 172.

(6) 26 A.L.J 760 : A.I.R 1928 A 316 ibid.

Question of malice only on plea of privilege.

It plaintiff proves malice.

If defendant fails to prove privilege

which a mistake howsoever reasonable is no defence (1). The question of malice thus arises only when a plea of privilege is raised (2). If the plaintiff proves malice, the defendant may still plead justification and proceed to substantiate the truth of the accusations; but if the plaintiff fails to prove malice the defendant is not required to substantiate the truth and the plaintiff will not be awarded any damages(3). If the defendant fails to prove that he made the statement on a privileged occasion honestly, the plaintiff will not be called upon to prove actual malice (4). For the law presumes malice in all cases of defamatory words (5), and it is for the defendant to rebut the presumption by, (a), pleading

(1) 32 C 318 : 8 C.W.N. 731, 12 M 374 (378).

(2) 62 C 838 : 39 C.W.N 845.

(3) 19 Pat L. T 186.

(4) 26 A.L.J 760 : A I.R 1928 A 316 supra, 7 L.B.R 64 : 22 I.C 273, 1942 A.L.W 696 (a voluntary statement was made to the police when making investigation after first information not called for by the situation and in a form not justified by the occasion, the plaintiff was not required to prove actual malice).

(5) 37 C 760 : 14 C.W.N 713 : 6 I.C 81, 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114, 11 L 45 : 117 I.C 90 : A.I.R 1929 L 561, 12 C.W.N 1053 : 19 M.L.J 20. : 4 M.L.T 1 : 1 I.C 348 P.C., 6 W.R 92. Malice is presumed from statememts contrary to fact, (1877) 3 Q.B D 237, 48 C 304 : 25 C.W N 150 : 63 I.C 467, 8 R 250 : A.I.R 1930 R 177, 4 B 298, 31 B 293 (not limited to hostility of feeling). Malice becomes manifest where the statement is false to the knowledge of the defendant, 32 C 318 : 8 C.W.N 731, 46 A 773 : 22 A.L.J 739 : 80 I.C 25 : A.I R 1924 A 848, 12 M 374 (378). Law imputes malice if the defamatory statement is false to the knowledge of the person making it at the time when he makes it, 11 O.W.N 122 : 148 I.C 427 : A.I.R 1934 O 8, Defamatory statements made quite uncalled for and wantonly are necessarily taken as made in bad faith, 51 A 509 : 27 A.L.J 303 : 115 I.C 458 : A.I.R 1929 A 214, 6 B.L.R. Ap. 42 : 14 W.R.Cr. 22, 3 A 664, (1896) P.J 376, 12 W.R 372. Where the statement does not go beyond what the occasion warrants, and is indeed a statement the truth of which can be inferred from the plaintiff's own allegations, no inference of malice can be drawn, 23 A.L.J 763 : 89 I.C 621 : A.I.R 1925 A 762.

and making out justification, that is, by proving that the accusation is true, (b) by claiming privilege, that is, by showing that he used the words on a privileged occasion (1), or (c) by pleading that it was a fair comment (2).

Intrinsic and extrinsic evidence of malice.

Evidence of malice may be either intrinsic or extrinsic. Intrinsic evidence consists in the contents of the statement itself. Its language, for example, may be so violent or insulting (going far beyond the just requirements of the occasion) as to amount in itself to sufficient evidence of malice (3). Extrinsic evidence consists in the circumstances under which the statement was made, circumstances which go to show that the statement, even though moderate and justifiable in language, was in reality animated by some improper motive. The intrinsic and the extrinsic evidence produced in cases of this kind may suggest several intermediate views of actual facts in regard to malice. The expressions used, motives attributed, the relevancy of the statements made, their total or partial falsehood, the antecedent conduct of the parties in relation to the matter under enquiry and the state of feeling between them at the time of the libel, are all evidence which may be taken

Facts in proof of malice.

(1) 37 C 760 : 14 C.W.N 713 : 6 I.C 81.

(2) Nothing is a libel which is a fair comment, 48 C 304 : 25 C.W.N 150 : 63 I.C 467.

(3) (1872) L.R 4 P C. p. 505, (1869) L R 4 Ex 232, (1877) 3 Q.B D. p. 345, 36 C 907 : 13 C.W.N 1165 : 3 I.C 831, 48 C 304 : 25 C.W.N 150 : 63 I.C 467. See 1 C.W.N 465, 7 A 906. It is not always a proof of malice.

Refusal to apologise.

into consideration in coming to a finding as to the existence of malice (1). Refusal to apologise before suit may be evidence of malice (2).

Not necessary to prove affirmatively.

It is not necessary that the plaintiff should prove affirmatively what this improper motive really was ; it is sufficient to disprove the existence of a proper motive, for example by showing that the defendant had no genuine belief in the truth of the statement (3). The absence of any genuine belief in the truth of the statement is conclusive proof of malice, for the defendant cannot have had a proper motive in saying what he did not believe to be true. If the imputation is made with the knowledge that it is false, there is an end of the privilege (4). If the imputation is made in a reckless and inconsiderate manner, if means of correct information are available and they are overlooked and no enquiry is made, there arises a presumption that there can be no honest belief where there is no honest effort to arrive at the truth (5). For deciding the issue as to the condition of the mind of the person publishing the statement, whether he was actuated or not by malice at the time of the publication, it is cogent evidence to know if the information upon

Absence of belief in the truth of the statement.

No honest effort to know the truth.

(1) 12 M 374 (378).

(2) 8 Bur L.T 278 : 30 I.C 930 (but this may be consistent with the defendant honestly adhering to his opinion).

(3) (1877) 3 Q.B.D p. 245.

(4) 12 M 374 (378).

(5) Ibid

which he acted was procured from a person who could not possibly know anything about the matter in question, and still he published the statements complained of as if they were based on sufficient information (1). So a libellous matter though privileged is not protected, if untrue (2). Where some defendants were entitled to claim privilege and acted without express malice, they did not lose their privilege because the other defendants may have had malicious motives (3).

Privilege not lost for malice of some defendants.

Whether a statement is privileged is a question of law for the Judge. The question for the jury is not whether the statement is privileged, but whether it was made maliciously, so that the privilege was thereby forfeited (4). That is to say, the existence of malice is a question of fact for the jury, but the burden of proof lies upon the plaintiff and the Judge has to be satisfied that there is some reasonable evidence of malice to go to the jury. On a plea of privilege it is not for the defendant to prove that he used his privilege honestly and for its proper purpose. It is for the plaintiff to prove

Privilege, question of law.

Malice, question of fact.

Onus on plaintiff to prove malice.

(1) (1937) 2 K.B 690 : 106 L.J (K.B) 555 : 157 L.T 93, (1920) 1 K.B 135 relied on.

(2) 24 M.L.J 8 : 12 M.L.T 377 : 16 I.C 736.

(3) 23 A.L.J 763 : L.R 6 A 417 : 89 I.C 621 : A.I.R 1925 A 762. See however (1913) 3 K.B 764, (1904) A.C 423 (malice in some will destroy privilege for all),

(4) (1895) 2 Q.B. p 169, (1891) 2 Q.B. p. 345. If however there is any preliminary question of fact on which this question of law depends, then that fact must be determined by the jury. Thus, it is a rule of law that an accurate report of judicial proceedings is privileged, but it is a question of fact for the jury whether the report is accutate or not.

that the privilege was maliciously used. Since the burden of proof thus rests upon the plaintiff, the question of malice must not be left to the jury, unless the plaintiff has produced reasonable evidence of its existence (1).

Privilege destroyed if exceeded.

Privilege is also forfeited if it is exceeded that is to say, if the publication of the defamatory statement is more extensive than the occasion of the privilege requires and justifies. Certain forms of privilege, indeed, permit of publication to the whole world; for example, the reports of judicial proceedings, or fair comment on matters of public interest. Privilege such as this cannot be exceeded in the sense now under consideration (2). But in other cases the privilege is limited to publication to certain persons only; it is a right of restricted publication and any disregard, whether intentional or negligent, of the limits thus imposed is termed an excess of privilege, and deprives the defendant of the benefit of it. Thus where a message which would have been privileged had it been sent in a closed letter, was unprivileged because sent by telegraph, for it was thereby published to the telegraph operator (3). Similarly, a publication to a

Excess of privilege.

Illustration.

(1) (1851) 10 C.B 583, (1872) L R 4 P.C 495, (1891) A.C 73, (1903) 2 K.B 100, (1877) 3 Q.B.D 237.

(2) 'Excess of privilege' sometimes means, not an excessive publication of a privileged statement, but the improper and malicious use of that privilege. In this latter sense evidence of excess means merely evidence of malice.

(3) (1874) L.R 9 C.P 393.

person who is mistakenly believed to be privileged to receive the communication, is an excess of privilege which will render the defendant liable (1).

Publication reasonably necessary.

No publication, however, which is reasonably necessary for the effective use of the defendant's privilege amounts to an excess of it. Thus, the act of the directors of a company in printing for distribution among the shareholders an auditor's report on the affairs of the company was not an excess of privilege (2). Similarly, defamatory statements made at a meeting of a board of guardians were privileged notwithstanding the presence of reporters for the press (3). So also a solicitor writing a defamatory and privileged letter on behalf of his client does not exceed and forfeit his privilege by publishing the letter in the ordinary course of business to his clerks (4). A company sending letters and telegrams on a privileged occasion to another company carrying on business abroad was likewise not liable for publishing those letters and telegrams to his own servants in the ordinary way of business (5). The person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable

Auditor's report.

Solicitor's letter.

Company's letters and telegrams.

(1) (1894) 2 Q.B 54.
(2) (1869) L. R 4 Q.B 262.
(3) (1891) 1 Q.B 474.
(4) (1894) 1 Q.B 842. See P. 60-61.
(5) (1907) 1 K.B 371.

and in the ordinary course of business, and if so it will not destroy the privilege (1). If a business communication is privileged as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business (2).

What has qualified privilege.

Qualified privilege attaches to, (a) reports of proceedings in Courts of justice, in legislatures and in public meetings, to, (b) fair comment on matters of public interest, and to, (c) communications made to public men for public good, or (i) made as a matter of duty, or (ii) made in self-defence, or (iii) where both parties are interested in the communication.

Privileged occasion.

In fact a privileged occasion with reference to qualified privilege, is an occasion when the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential (3).

(I) Reports of proceedings in court.

Reports of proceedings in court.

It has already been indicated when reports of judicial proceedings are absolutely privileged, and when such reports carry only a qualified privilege. See p. 99.

(1) (1907) K.B p. 380 (per Collins M.R).
(2) Ibid p. 382 (per Fletcher Moulton L.J). See also p. 61.
(3) 164 I.C 385 : A.I.R 1936 R 332.

This privilege attaches only to proceedings of courts (1), but not of private tribunals (2), or of domestic forums (3).

(a) of official records.

Publication of official records.

The publication, whether in a newspaper or elsewhere, of correct copies of, or extracts from, any judicial or official records, which are by statute open to public inspection, is the subject of conditional privilege at common law (4). Thus, a newspaper is entitled to publish extracts from the public registers, Government resolutions or reports, judgments of Courts, or appointments of receivers under the Companies Act, etc., and is not responsible, in the absence of malice, for any error in the registers, or for any defamatory suggestion that may be contained in the matter so extracted.

(II) o proceedings of legislature.

Reports of proceedings of legislatures.

Fair and accurate reports of parliamentary debates are conditionally privileged by common law (5). See p. 101.

(III) of public meetings.

Reports of proceedings of public meetings.

The reports, whether in a newspaper or elsewhere of the proceedings of public meetings possess no privilege at common law (6). It has however been since provided

(1) (1925) 2 K.B 158, (1878) 3 C.P.D 319, (1889) 14 A.C 104.
(2) (1893) 1 Q.B 65.
(3) (1932) 2 K.B 431 (475), (1901) 18 T.L.R 201.
(4) (1848) 1 H.L.C 363, (1892) 2 Q.B 56, (1895) 64 L.J.Q.B 566, (1909) 25 T.L.R 677. The case in (1888) 22 Q.B.D 134 is of doubtful authority.
(5) (1868) L.R 4 Q.B 73.
(6) (1877) 2 C.P.D 215.

by s. 4 of the Law of Libel Amendmen Act, 1888, that fair and accurate reports in newspaper of the proceedings of any publi meeting, or of any of the other kinds o meetings referred to in that section, shal be conditionally privileged, provided tha the matter published is of public concern and the publication of it is for the publi benefit (1). The plaintiff and the defendant were rival candidates at an election and the plaintiff called the defendant "a rowdy and a suspect". The defendant retorted by saying that the plaintiff was a drunkard. The defendant was elected at the meeting. After the election was over the defendant was asked by some people as to what had happened inside and he told them that the plaintiff was a drunkard. The plaintiff filed a suit for damages for the expressions used by the defendant. It was held that the defendant could claim the right of privilege so far as the expression used inside the meeting was concerned, but that privilege did not extend to anything which the defendant did outside the meeting and after the meeting was over, so that the plaintiff was entitled to damages for the words used outside the meeting after the meeting was over (2).

Illustration.

(1) 51 & 52 Vict., c. 64, s. 4.

(2) 52 M.L.J 87 : 1927 M.W.N 83 : 25 L.W 770 : 100 I.C 90 : A.I.R 1927 M 329.

CHAPTER VIII

FAIR COMMENT

Plea of fair comment.

The defendant in an action for libel may claim immunity by pleading that it was a fair comment, for, as already observed, a statement is privileged if it is a fair comment on a matter which is of public interest or is submitted to public criticism(1).

Essentials.

The essentials of a fair comment are,—

(i) that it is a comment or criticism, and not an allegation or assertion of fact ;

(ii) that the comment is on a matter of public interest ; and

(iii) that the comment is fair.

Fairness.

The important requirement is that the comment must be fair i. e., relevant to the subject matter and honest in the expression of the writer's real opinion, though mere honesty of purpose cannot avail the writer if the words exceed their proper limits. An honest comment is not necessarily a fair comment ; nor is an exaggerated, or strong, or prejudiced comment necessarily unfair, though the fairness of the comment often depends upon the language used. The comment must also be bonafide, and not

Honesty of purpose irrelevant.

Honest comment.

Strong comment.

Bonafide.

(1) 48 C 304 : 25 C.W.N 150 : 63 I.C 467, 37 C 760 : 14 C.W.N. 713 : 6 I.C 81, 25 M.L.J 476 : 21 I.C 625, (1872) L.R 7 C. P 606, (1906) 2 K.B 627.

Malice destroys privilege.

made from any malicious motive. Malice, as in all cases of qualified privilege, destroys the privilege. Where fair comment is

Onus on defendant.

pleaded, the onus will lie upon the defendant to show that it is so, and it will then lie on the plaintiff to prove malice so as to destroy the privilege (1).

Not an allegation of fact.

It must not be an allegation of fact. Comment or criticism is essentially a statement of opinion as to the estimate to be formed of a man's character or actions. Being therefore a mere matter of opinion and so incapable of definite proof, he who expresses it is not called upon by law to justify it as being true, but is privileged to express it, even though others disagree with it, provided that it is fair and honest. It

Based on fact.

must be a comment based on facts, not an allegation of fact, in order to be availed of as a defence (2). Thus, it is a comment to say that a certain act done by the plaintiff is unwise or absurd, but it is an unprivileged statement of fact to say that he committed the act so criticised. Indeed the very statement of the rule assumes the matter of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented, on the supposition that the facts were true (3).

(1) 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114.

(2) 48 C 304 supra. See 35 C 495 : 12 C.W.N 490, 36 C 907, 31 B 293, 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114.

(3) (1879) 4 L.R Ir. p. 565, (1879) 5 Q.B.D at p. 8.

Comment and allegation of fact.

It is therefore essential that comment or criticism must be carefully distinguished from allegations of fact, in as much as it is one thing to comment upon or criticise even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct (1) ; the former is privileged where it relates to a matter which is of public interest, the latter is unprivileged and actionable, even though the facts so stated would, if true, have possessed the greatest public interest and importance. Where, therefore, the words which are alleged to be defamatory, allege or assume as true, facts concerning the plaintiff which the plaintiff denies, and which either involve a scandalous imputation in themselves, or upon which the comment bases imputations or inferences injurious to the plaintiff, there the defence of fair comment fails and the defendant's safety will lie in pleading justification that the facts alleged ate true (2). Similarly, to allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be justified by sufficient evidence (3). An allegation of fact must be either true or privileged (4).

(1) (1886) 11 A.C 187 at p. 190.

(2) (1909) 1 K.B 239, at p. 256, per Kennedy L.J. See (1886) 11 A.C p. 190, (1879) 4 L.R. Ir. p. 565, 37 L.W 566 : 1933 A.L.J 625 : 141 I.C 518 : A.I.R 1933 P.C 36.

(3) 1936 A.L.J 1014 : 1936 A.W.R 943 : 165 I.C 892 : A.I.R 1936 A 780, (1908) 2 K.B 309 (319) followed.

(4) 35 C 495 : 12 C.W.N 490.

If there is no privilege to claim, the fact must be proved to be true to escape liability for damage. Fair comment is limited to comment or criticism on undisputed facts and is not to be mixed up with statements of fact. A defamatory statement of fact may in certain circumstances be covered by a plea of fair comment in the form of what is commonly called the 'rolled-up plea' (i.e. two defences rolled into one), namely, that 'in so far as the statements complained of are statements of fact they are true in substance and in fact, and in so far as they consist of comment they are fair comment on a matter of public interest'. If any matter of fact is of such a nature as to be open to comment, a plea of fair comment in this form is sufficient, without any separate plea of justification, to cover any inferences of fact, however defamatory, which are correctly drawn from the principal fact commented on (1).

Limited to undisputed facts.

Rolled-up plea.

So, for a simple plea of fair comment, the defamatory matter must appear on the face of it to be a comment and not a statement of fact. If the statement is ambiguous in this respect, a plea of fair comment is not available, but the statement must be justified as true (2). To state barely that the plaintiff has been guilty of negligence

ambiguous.

(1) (1907) 1 K.B 502, (1908) 2 K. B 309, 325 n, (1909) 1 K.B 239, (1925) A.C., at 62, 99. See 37 Bom L.R 1033 ; 161 I.C 769 : A.I.R 1936 B 114 (such a composite plea has been held to be a plea of fair comment only).

(2) 1933 A.L.J 625 : 37 L.W 566 : 141 I.C 518 : A.I.R. 1933 P.C 36.

or incompetence in some public office held by him is stating a fact even though intended as a comment upon facts and so must be justified (1). To come within a plea of fair comment therefore, the facts on which the comment is based must be stated or referred to, and the inference of negligence or incompetence must appear as an expression of the defendant's opinion on those facts. Any matter thus which does not indicate with a reasonable clearness that it purports to be a comment, and not a statement of fact, that is, if fact and comment are intermingled, it cannot be protected by a plea of fair comment (2). It must appear as a comment and must not be so mixed up with facts that the reader cannot distinguish between what is report and what is comment (3). The responsibility of the critic is to be gauged by the effect which his comment is calculated to produce, and not by what he says was his intention. It is not enough that he should intend to from his opinion on the work before him ; he is also bound to express his opinion with due care and caution and to give the public no ground for supposing that he is speaking of anything but the performance submitted to his judgment (4).

Facts must be stated.

Fact and comment intermingled

Effect of comment.

Due care and caution.

(1) See 35 C 495 : 12 C.W.N 490.

(2) (1908) 2 K.B 309 at p. 320, per Fletcher Moulton L.J., 1936 A.L.J 1014 : 1936 A.W.R 943 : 165 I.C 892 : A.I.R 1936 A 780.

(3) 1933 A.L.J 625 P.C supra (if the report and the comment can be distinguished the report may be defended under the plea of publication in good faith for information of the public, and the comment as fair comment).

(4) 31 B 293.

Read with context

What appears to be an allegation of fact, may, however, be shown by the contex to be an expression of opinion. To write of a man that 'he is a disgrace to human nature' is a defamatory allegation of fact. But if the words were 'He murdered his father and therefore is a disgrace to human nature', it is clear from the contex that the words which follow are merely a comment upon the preceding words.

Facts to be truly stated.

Lastly, a fair comment must not only be based on facts, but the facts must be truly stated (1). If the facts stated are correct, reasonable and even plausible criticism may be justified as fair comment, but if there are no facts to warrant the imputation, the defence of fair comment cannot be maintained (2), as without facts the plea has no foundation (3). A comment based on a misstatement of facts is neither fair (4). If the defendant cannot show that his comments contain no misstatements of facts, he cannot prove a defence of fair comment(5). A plea of fair comment does not extend to cover misstatements of facts, however bona fide, so that the plea is not available if the

Misstatement of facts.

(1) 36 C 883 : 13 C.W.N 895 : 6 M.L.T 73 : 3 I.C 224 (on appeal 37 C 760 : 14 C.W.N 713 : 6 I.C 81), 30 M.L.J 294 : (1916) 1 M.W.N 267 : 3 L.W 67 : 32 I.C 408, 1933 A.L.J 625 : 37 L.W 566 : 141 I.C 518 : A.I.R 1033 P.C 36.

(2) 22 L.W 26 : 85 I.C 900 : A.I.R 1925 M 950.

(3) 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114, 1936 A.L.J 1014 : 1936 A.W.R 943 : 165 I.C 892 : A.I.R 1936 A 780.

(4) Ibid.

(5) 48 C 304 : 25 C.W.N 150 : 63 I.C 467, (1907) 1 K.B 502, per Collins M.R at p. 507. See also (1909) 1 K.B 239, at p. 256.

facts are not truly stated (1). Where a newspaper article contained defamatory statements of facts which were not proved, it could in no sense be considered a fair comment, and the mere fact that the defendant bona fide believed them to be true was immaterial (2).

Bonafides immaterial.

Any member of the public therefore can comment fairly on facts truly stated on a matter of public interest, but the allegation of a fact imputing an act of misconduct takes the libel out of the sphere of fair comment, the allegation then must be proved to be true (3). Thus a journalist is entitled to comment on matters of public interest and no suit will lie against him for defamation, unless he has exceeded the bounds of fair comment, or is actuated by malice, i. e., unless he makes his comments a cloak for malice and slander. If statements are derogatory of a person, they must be stated as matters of comment and not as matters of fact in which case they will have to be justified, i. e., they will have to be proved as founded on truth (4). In a column in a daily for expressing the views

A cloak for malice and slander.

Illustration.

(1) 36 C 883 : 13 C.W.N 895 : 6 M.L.T 73 : 3 I.C 224 (on appeal 37 C 760 : 14 C.W.N 713 : 6 I.C 81).

(2) 55 C 1121 : 32 C.W.N 490 : 113 I.C 834 : A.I.R 1929 C 69 (on appeal from 54 C 73 : 101 I.C 565 : A.I.R 1927 C 297).

(3) 15 Bom. L.R 130 : 19 I.C 98, 35 C 495 : 12 C.W.N 490.

(4) 25 M.L.J 476 : 21 I.C 625, 35 C 495 : 12 C.W.N 490, 1 Bom. Ap. 85 (not liable if the comments are made for public good, are honestly made and he honestly believes the fact as he states them). See 3 A 342. A statement of fact may at times amount to no more than a comment, 30 M.L.J 294 : (1916) 1 M.W.N 267 : 3 L.W 67 : 32 I.C 408.

of listeners on broadcast entertainments, a letter was published under the generic heading of 'flambe entertainments'. The letter contained matter which was capable of being defamatory of the plaintiffs as artistes. It was admitted that the letter was from a non-existent address and a fictitious person. The writer was minded to lend point to the letter by using a false name and a false address which would suggest that he was a responsible person and a minister of religion. In the circumstances it was held the defence of fair comment was not open to the defendants (1).

Newspaper comment.

In fact newspapers are subject to the same rules as other critics and have no special right or privilege, and inspite of the latitude allowed to them it does not mean that they have any special right to make unfair comments or to make imputations upon the character of a person or imputations upon or in respect of a person's profession or calling. The range of a journalist's criticism or comments is as wide as, and not wider than that of any other subject. Though it may be said to be true in one sense that newspapers owe a duty to their readers to publish any and every item of news that may interest them, that is not however such a duty as makes every communication in the paper relating to a matter of public importance a privileged one. The defend-

(1) (1943) K.B 746 : 112 L J (K.B) 547 : (1943) 1 All E.R. 586.

ant has to show that what he communicated was relevant or partinent to the privileged occasion (1). Similarly, it is a libel to write that the plaintiff used to get permission to move and second propositions in public meetings by sending threatening letters to the convenors (2). The facts upon which the comment is founded must therefore be truly stated, though later they may not turn out to be true at all, for a fact may be truly stated and may yet be utterly untrue (3).

Truly stated though may turn out to be false.

While however a journalist is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy, where these deviations do not affect the general fairness of the comment (4). Besides, if a statement of fact is itself privileged and the subject matter is one which is open to comment, the plea of fair comment is not excluded by the circumstance that the statement of fact on which the comment proceeds is erroneous. Thus, for example, one who comments on the statements contained in the judgment of a Court of justice or in a parliamentary paper, may plead fair comment although

Slight deviations.

Illustrations.

(1) 43 Bom. L.R 631 : 196 I.C 503 : A.I.R 1941 B 278 : 43 Cr. L.J 17.
(2) 15 Bom. L.R 130 : 19 I.C 98.
(3) 20 Bom. L.R 185 : 47 I.C 449.
(4) 20 Bom. L.R 185 : 47 I.C 449, 30 M.L.J 294 : (1916) 1 M.W.N 267 : 3 L.W 67 : 32 I.C 408, 37 Bom. L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114.

the statements are mistaken (1). The controlling body of a corporation (municipal commissioners) similarly are not only entitled but it is their duty to look at the previous record of an employee and if they describe him as quarrelsome from the record, it would be a perfectly fair comment (2). In an action for defamation the defendant pleaded that the words complained of were comments made in good faith and without malice upon a matter of public interest and sought to give particulars of the facts upon which he was commenting, those facts being in themselves defamatory of the plaintiff. The plaintiff objected to them as being a colourable attempt to set up justification without putting on record a plea of justification. It was held that the defendant was entitled to show and must show what the facts were upon which he commented, that they were facts, that the matter is one of public interest and that the comment (i. e., the inferences and comments) are fair, that is, made in good faith and without malice (3).

Right offair comment.

The right of unprivileged comment is universal, that is, there is full liberty to criticise all men and things, public and private, provided that the criticism is true. But the right of privileged comment is limited to certain matters, that is to say, it

(1) (1909) 2 K.B 958 (976, 977).
(2) 33 A.L.J 763 : L.R 6 A 417 : 89 I.C 621 : A.I.R 1925 A 762.
(3) (1929) 1 K.B 301 : 98 L.J.K.B 165.

is only in a limited class of cases that there is any right to express one's own opinion honestly and fearlessly regardless of whether others will agree with it or not. Indeed a fair and bonafide comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication (1). Any person whether he is a private individual or a public journalist, has a right to hold any views he pleases on a subject and to express the same. It is immaterial whether the opinion or the comment is correct or not correct, whether it is just or unjust, or whether it is couched in language which may not err on the side of moderation. What is material and important is that the comment must not go beyond the limits of what the law calls fair (2).

Matters of privileged comment.

This right of privileged comment exists, we have seen, (a) in matters of public interest, and (b) in matters, which, although of no public interest, have been submitted to criticism by the persons concerned.

Matters of public interest.

(a) Matters of public interest are matters which by their very nature affect the public weal and touch upon public business so that any individual citizen has a right to express himself in fair and proper comment or criticism (3). In fact, there is no exact

(1) (1879) 4 L.R Ir. p. 565.

(2) 43 Bom L.R 631 : 196 I.C 503 : A.I.R 1941 B 278.

(3) 55 C 1121 : 32 C.W.N 490 : 113 I.C 834 : A.I.R 1929 C 69 (on appeal from 54 C 73 : 101 I.C 565 : A.I.R 1927 C 297), per Rankin C.J (a matter in which some section of the public is taking interest is not such a matter).

definition of the words 'matters of public interest'. Such matters are very numerous and are usually grouped under certain heads. A matter of public interest can generally be said to be a matter or subject which invites public attention or is open to public criticism or discussion (1). The administration of justice, the affairs of Parliament, the conduct of the executive Government and of public servants, the mode in which local authorities and other public bodies perform their functions, the management of public hospitals and other public institutions, the conduct of public worship in the Church of England may be mentioned as instances of matters which are of public interest. Thus the conduct of Magistrates (2), a petition to Parliament for the removal of a Judge (3), the administration of the poor law (4), the report of the Board of Admiralty on the plans of a naval architect (5), the conduct of public worship (6), the conduct of a meeting assembled to hear election address (7), the sanitary condition of the cottages provided by a colliery company for its workmen (8), are matters of public interest, comment on which is privileged. Similarly, the public

Illustrations.

(1) 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114.
(2) (1864) 4 F & F 243.
(3) (1868) L.R 4 Q.B 73.
(4) (1878) 2 C.P.D 215.
(5) (1872) L.R 7 C.P 606.
(6) (1865) L.R 1 Q.B 699.
(7) (1874) L.R 9 C P 396.
(8) (1894) 1 Q.B 133. See also (1901) 2 K.B 292.

are intersted in the administration of law and justice and it would be open to them to comment fairly and bona fide upon the administration of justice as evidenced at a trail (1). So, it is lawful to discuss the propriety of the verdict of a jury or the decision of a Judge, but at the same time it would not be open to give reckless vent to harsh and uncharitable views, or to impute corruption (2), or declaim in the language of invective. It would thus not be open to a person to suggest that a prisoner who has been acquitted was really guilty (3), or that a witness committed perjury (4). Further, no comment should be made during the progress of a trial or on any pending action, as this would amount to a contempt of court (5).

Administration law and justice.

Pending trials.

The conduct of a returning officer or of officials in charge of polling booths at a county council election is a matter of public interest (6). Ecclesiastical affairs and in India religious affairs like the management of a mutt or a religious endowment are matters of public interest (7). But the conduct of a trustee of a private corporation is not a matter of public interest.

Conduct of returning officers.

Ecclesiastical affairs.

Private corporation.

(1) (1922) 1 Ch 276, (1865) 11 L.T at p. 543, (1874) 30 L.T 264.
(2) (1900) 2 Q.B 36.
(3) (1868) 18 L.T 615.
(4) (1865) 176 E.R 541 : 142 R.R 674.
(5) (1839) 48 E.R 1129 : 50 R.R 121, (1896) 1 Q.B 577.
(6) (1908) 2 K.B 309.
(7) (1865) 1 Q.B 699.

Company prospectus.

The prospectus of a company is a matter of public interest. So also the management of its business according to the prospectus which invites the public to deal with the company, and the conduct of a private business if it is of a sufficiently large extent or concerns a sufficiently large number of persons, must be considered to be matters of public interest (1).

Matters of local interest.

It makes no difference that the public interest of the matter in question is limited to a particular locality, instead of extending throughout the realm. That which is primarily of public interest to the citizens of Manchester is indirectly of public interest to all England (2). But discussion of affairs concerning the Parsis in papers circulated among all classes of readers is not privileged, even where the plaintiff has made the matter one of public interest (3).

Affairs concerning Parsis.

Onus on defendant.

The onus is on the defendant to show that the matter commented upon is a matter of public interest, that the statement of facts relating thereto is true, and that the comments based on the facts are fair and bona fide. It will then be for the plaintiff to show that the words exceed the limits of fair comment and are not real expressions of opinion or that the words are inspired by malice(4).

(1) 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114.
(2) (1877) 2 C.P.D. p. 218, (1863) 4 F & F p. 20.
(3) 15 Bom L.R 160 : 19 I.C 98.
(4) 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114.

(b) Matters not of public interest may be submitted to public criticism by the persons concerned. If a matter is not of public interest there is no right of comment, but one may voluntarily give up his right of privacy, and submit himself or his deeds to public scrutiny or judgment and therby he submits to the exercise of the right of public comment (1). This right thus extends to books and every form of published literature, works of art publicly exhibited and public musical and dramatic performances. So also with any form of appeal to the public, such as advertisements, circulars, or public speeches (2).

Matters submitt to public criticism.

Books.

Published liter ture, works of musical and dramatic perfo mances.

Advertisement speeches etc.

A man's moral character is not a permissible subject of adverse comment, and this is so even though the person so attacked occupies some public position which makes his character a matter of public interest. He who says or suggests that a person is dishonest, corrupt, immoral, untruthful, inspired by base and sordid motives, must justify his accusation by proving it to be true. It is a privileged fair comment to accuse a man of folly, but not to accuse him of vice ; of want of dignity but not of want of honesty ; of incapacity, but not of corruption ; of bad taste but not of

Moral character

(1) (1859) 175 E.R 873.

(2) (1863) 3 B.&.S 769, (1887) 20 Q. B. D. 275 (any published book can be criticised and in fact, as has been said, a man who publishes a a book challenges criticism), (1903) 2 K. B. 100, (1906) 2 K.B 627.

mendacity (1). It was thus actionable to suggest, however honestly, that the editor of a religious magazine, in advocating a scheme of missions to the heathen, was in reality an imposter inspired by motives of pecuniary gain (2). Indeed, a writer in a public paper may comment on the conduct of public men in the strongest terms; but if he imputes dishonety, he must be prepared to justify it (3). Such a personal attack, therefore, is to be regarded as a defamatory statement of fact, and not as a mere comment, so that it will not be covered by a plea of fair comment, unless it is a correct inference from the facts commented on. It is not a sufficient defence in such a case (as in other forms of defamatory comment), that the statement has been honestly, even though erroneously, made as a fair comment on a matter of public interest; but it is a good defence under a plea of fair comment (without a separate plea of justification) that the statement is a correct inference warranted by the facts commented on. Indeed a personal attack may form part of a fair comment upon given facts truly stated, if it be warranted by those facts, that is to say, if it be a reasonable inference from those facts, otherwise not (4).

Conduct of public men

Correct inference warranted by facts.

(1) (1863) 3 B & S 769. See (1840) 6 M & M 105; 55 R.R 529, (1904) 2 K.B 292. Also (1908) 2 K.B 309, 325 (n).

(2) (1863) 3 B & S 769 ibid.

(3) 32 L.J.Q.B. p. 192, 196 199.

(4) (1908) 2 K.B p. 329.

Question for Judge and Jury.

Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment, is a matter of law for the determination of the Judge before whom the case is tried ; but if he should rule that this inference is capable of being reasonably drawn, it is for the Jury to determine whether in that particular case it ought to be drawn (1). Indeed, comment must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation. A libellous imputation is not warranted by the facts, unless the Jury hold that it is a conclusion which ought to be drawn from those facts. Any other interpretation would amount to saying that where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment which is not allowed by law (2).

Libellous imputation not warranted by facts.

When comment is fair.

A comment is fair, (a) when, as has already been stated, it is based on facts ; (b) when it is relevant and is a legitimate (reasonable) inference from those facts. It need not be an inevitable inference. Fair comment impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is required is that inference from facts truly stated should be

(1) (1908) 2 K.B p. 329 ibid.
(2) (1908) 2 K. B p. 320.

fair, that is one possibly out of many equally or almost equally fair inferences (1). And, (c) when it is fair i, e., honest not inspired by malice (2). If these conditions are satisfied, it would be a fair comment though expressed in howsoever strong, violent, or even hostile language. Mere exaggeration would not make a comment unfair. However exaggerated the opinion expressed may be in point of truth or however prejudiced the writer, it may still be within the prescribed limits. The question which the jury must consider is this: "Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said (3)". When privilege is set up, the defendant claims a protection by standing in a special relation, whereas if he sets up fair comment, he asserts only what every one has a right to do (4). Indeed, the right of fair comment on matters of public interest is a right which it is the duty of Courts carefully to guard and liberally to interpret (5).

Exaggeration.

Fair comment and other privilege.

To be liberally interpreted.

Comment must be fair.

The comment must be fair, otherwise it will be actionable as unprivileged. This does not mean that the comment must be

(1) 20 Bom L. R 185 : 47 I. C 449, (1909) 1 K. B at p. 253, (1903) 2 K. B 100, at p. 109. See however (1908) 2 K.B at 329.

(2) (1903) 2 K.B 100. See (1888) 4 T.L.R 574.

(3) (1887) 20 Q.B.D 275, at 280, per Lord Esher. See however (1866) L.R. 4 Q.B at p. 96

(4) 48 C 304: 25 C.W.N 150: 63 I.C 467.

(5) 22 L.W 26 : 85 I.C 900 : A.I.R 1925 M 950.

true, for true comment needs no privilege any more than any other true comment. 'Fair comment' does not either mean what the ordinary man would think a correct appreciation of the work (1), but means comment honestly believed to be true and not inspired by any malicious motive (2). Unfairness means the presence of malice(3). So that where a defence of fair comment is taken it can be rebutted in the usual way by proof that the privilege has been maliciously abused. The absence of any genuine belief in the truth of the comment is conclusive proof of malice, for no man can have a proper motive for making defamatory statements which he does not believe to be justified.

Not true comment.

Not ordinary man's idea.

Honest, not inspired by malice.

Unfair when inspired by malice.

Rebutting defence of fair comment.

The burden of proving that a comment is unfair is on the plaintiff who complains of it. Here, as in other cases of qualified privilege, it is for the plaintiff to rebut the defence of privilege, by proving that it was abused and forfeited (4).

Burden of proof.

(1) (1903) 2 K.B p. 109, per Collins M.R (it is of the highest importance to the community that the critic should be saved from any such possibility).

(2) (1906) 2 K.B 627, (1903) 2 K.B 100 The true nature and meaning of the defence of fair comment was long obscured by certain unfortunate dicta in (1887) 20 Q.B.D 275, namely, that in fair comment there is no question of the occasion being privileged, but it is the right of every person in the realm and the only question is whether the limits of fair comment have been exceeded. but the law has since been put right by the above two cases.

(3) As for malice see p.106-7. Even a comment genuinely believed to be true will be actionable as unfair, if it is inspired by improper and malicious motives. A comment is sometimes classed as unfair even in the absence of any dishonesty or malice, if the critic fails to show a certain degree of moderation, judgment and competence, see (1868) L.R 4 Q.B p. 96. But see p. 132.

(4) (1903) 2 K.B 100.

Fairness, question of fact for Jury.

Function of Judge.

Whether a comment is fair is a question of fact for the Jury. But it is for the Judge to decide in the first place, (a) whether the subject is one which in law is open to comment, and (b) whether there is any reasonable evidence to go to the Jury that the comment is unfair (1). There are therefore two distinct checks on the action of a Jury in the case of fair comment. In the first place, they are not at liberty to find for the plaintiff on the ground that in their opinion the matter was not a fit one for public comment,—which is a question of law for the Judge. In the second place, they are not at liberty to find for the plaintiff on the ground that the comment is unfair, unless the Judge is first satisfied that there is sufficient evidence, extrinsic or intrinsic, of unfairness, on which such a verdict could be found. A Judge may stop the case when the article is so fair that it cannot amount to libel on the admitted facts (2). The article must be considered in its entirety rather than by separate instances in isolated passages and the Judge must decide what impression would be produced on the mind of an unprejudiced reader, who knowing nothing of the matter beforehand, reads the article straight through (3).

When Judge may stop the case.

Whole article should be read.

Impression on unprejudiced reader.

(1) (1903) 2 K.B 100 ibid, 32 M.L.J 392 : 21 M.L.T 324 : 5 L.W 598 : 40 I.C 126. See 1 C.W.N 455. Also 20 Bom L.R 185 : 47 I.C 449, where the distinction is fully discussed.

(2) 32 M.L.J. 392 ibid.

(3) 20 Bom. L.R 185 supra, 1931 A.L.J 16 : 129 I.C 551 : I.R 1931 A 183 : A.I.R 1931 A 126.

CHAPTER IX

OTHER CASES OF QUALIFIED PRIVILEGE.

Communications to public men if true and honestly made for public good are privileged. Thus the defendant falsely writing that the plaintiff instigated the breaking off ot the marriage of a certain girl out of ill-will is liable to damages, but if the defendant proves that he honestly believed the statement to be true and that he published it in order that the matter should be investigated by the society concerned, he is protected (1).

Communications to public men for public good.

Generally speaking where a person in the discharge of some public or private duty whether legal or moral or social, or in the conduct of his own affairs in matters where his interest is concerned, honestly makes a statement fairly warranted by the occasion, the circumstance prevents the inference of malice, and such statement will be protected for the common convenience and welfare of society (2). The privilege will be

Statements in performance of duty.

(1) 41 A 329 : 17 A.L.J 278 : 50 I.C 398.

(2) 9 O & A.L.R 302 : 72 I.C 57 : A.I.R 1923 O 217, 12 C.W.N 1053 : 19 M.L.J 20 : 4 M.L.T 1 : 11 I.C 348 P.C., 8 Bom. Cr. 168. See 28 M 464, also (1874) 1 C.M & R 181 : 40 R. R 523, (1891) 2 Q.B 341. The reason for holding any occasion privileged is common convenience and welfare of society, 7 L.B.R 64 : 22 I.C 273. To submit the language used on a privileged occasion to a strict scrutiny and hold all excess beyond the absolute exigency or the occasion to be evidence of express malice would greatly limit, if not altogether defeat, the protection which the law gives to statements made on such occasions, 23 A.L.J 763 : 89 I.C 621 : A.I.R 1925 A 762, 32 C 318 : 8 C.W.N 731. See 35 C.W.N 271 : 52 C.L.J 345.

rilege when

lost, (a) where it goes beyond the limits of duty or interest, (b) where it is actuated by malice i.e. where the occasion is not legitimately used but abused (1). So a statement is conditionally privileged if it is made in the performance of a legal or moral duty imposed upon the person making it (2). The hard rule of absolute liability for error is applicable only to those persons, who, without any just call or occasion, venture to attack the reputation of others. But where a defamatory statement is made in the fulfilment of a duty, there is no liability in the absence of malice. The duty need not be and indeed seldom is, one enforceable at law ; it is sufficient that by the moral standard of right conduct prevalent in the community the defendant lay under an obligation to say what he did. It is however not enough that he believed himself to be under such an obligation. The question is, what is the defendant's duty, not what he thinks to be his duty (3). It is for the Judge, and not for the Jury, to decide whether on the facts as proved such a duty existed (4). After a theft of petrol from a Borough Council's depot and the conviction of two of its employees for the theft, the council appointed a committee to enquire into the circumstances relating to the loss

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stration.

(1) (1930) 1 K.B 130 : 98 L.J.K.B 711.

(2) (1834) 1 C.M & R 181 : 40 R.R 523 , (1891) 2 Q.B 341, 1937 M.W.N 884 (statement in protection of a trust fund).

(3) (1863) 15 C.B (N.S) p. 412. See also (1891) 2 Q.B 341.

(4) (1891) 2 Q.B. p. 350.

of the petrol. The committee in their report set out the names of certain others of the council's employees as having been implicated by one of those convicted, but without expressing any finding it recommended that the persons so implicated may be transferred from their present positions to other positions. The town clerk issued notices of a meeting of the council to consider the report. Copies of the notice together with full a report of the committee were affixed on the door of the meeting hall and were also sent to each of the public libraries of the borough according to practice. The men named brought an action against the town clerk, mayor, aldermen and councillors for damages for libel. It was held that the publication was not privileged as there was no duty or interest to make the communication to the ratepapers at that stage (1).

Solicitor's duty to client.

A solicitor owes a duty to his client, which confers upon the solicitor the same privilege, if any, that is possessed by his client in the matter (2). Where the headman of a caste announces the decision of the caste excommunicating a member, he does his duty and is protected (3). Where the defendant had in the course of his

Duty of a headman of a caste.

Reference to rumours in official capacity.

(1) (1942) 1 K.B 156 : (1942) 1 All E.R 19 (C.A).

(2) (1894) 1 Q.B 838,

(3) 24 B 13, 69 M.L J 9 n, 137 I.C 499 : 1932 A.L.J 75. See 6 Mad. Ap. 47, 6 M 381, 17 M 223, 22 C 46, 26 B 171, 39 A 561 P.C., 47 M.L.J 8 : 83 I.C 999 : A.I.R 1924 M 670, 45 M.L.J 116 : 72 I.C 165 : A.I.R 1923 M 587. But illegal declaration is not privileged, 12 M 495.

official duty referred to certain rumours against the plaintiff he was not liable (1). A report by an officer of a railway company, not of his own accord but at the bidding of his superior officer, submitted to the superior officer without any one being told of it, is privileged (2). It is the duty of a police officer to report when called upon, as to the fitness of a person to be granted a gun license and defamatory statements made in his report are privileged and the privilege is not destroyed if he adds a recommendation that the license should be cancelled (3). A slanderous statement made to the official superior of the slandered person which is not intended for a Court of Justice has likewise a qualified privilege attached to it (4). Libellous statements contained in petitions to the Manager of the Court of Wards and the Deputy Commissioner carry a qualified privilege (5). According to an Allahabad case, a report submitted to a Magistrate under section 202 Criminal Procedure Code, by an Inspector of Police through the Superintendent of Police is absolutely privileged and no suit for libel lies against him in respect of allegations made in that report, whether malice existed or not (6). It is submitted however that such a report

Duty of police officer to report about gun license.

Police reports.

(1) 46 A 773 : 22 A.L.J 739 : L.R 5 A 533 : 80 I.C 25 : A.I.R 1924 A 848.
(2) 19 Pat. L.T 186.
(3) 27 B 585.
(4) 15 Bom. L.R. 249 : 19 I.C 480.
(5) 17 Pat. L.J 816 : 162 I.C 809 : A.I.R 1936 P 309.
(6) I.L.R 1937 A 390 : 1937 A.L.J 20 : 1937 A.L.R 191 : 1936 A.W.R 1205 : 167 I.C 438 : A.I.R 1937 A 90.

carries only a qualified privilege and the Inspector will be liable if actuated by malice.

Report of crime to police.

The report of a crime to the police carries with it a qualified privilege, that is to say, the defendant will be protected if he had an honest belief that what he said was true. For if a man comes to know of the commission of a crime, he owes a duty to the society and to the state to communicate it to the authorities and he cannot be liable if it turns out that the person is not really guilty (1). So that where there is a theft in one's house and he makes a report naming another as concerned in it in the honest belief that the other was so concerned, a suit by the latter for damages for defamation is not maintainable (2). Similarly, any person who has reason to believe that there has been a defalcation of public money, has a duty to inform the authorities concerned and the information is privileged (3). A letter to the Commissioner of Police containing defamatory statements against another likewise carries a qualified privilege (4). A zemindar had applied for the removal of a village Munsif, but

Report of theft.

Information as to defalcation of public money.

(1) 9 O & A.L.R 302 : 72 I.C 57 : A.I.R 1923 O 217

(2) 2 O.W.N 822 : 90 I C 951 : A.I.R 1926 O 18 (honest belief and reasonable cause do not come to the same thing), 26 A.L.J 760 : A.I.R 1928 A 316, 7 L.B.R 64 : 22 I.C 273, 6 Bur. L.T 100 : 20 I.C 290. See 5 W.R 282, 6 W.R 215 (failure of a bona fide criminal charge).

(3) 11 O.W.N 122 : 148 I.C 427 : A.I.R 1924 O 8 (the informant cannot be liable for tort unless actual and express malice is proved against him. The motive of the informant is not material but the law will imply malice if the information is false to the knowledge of the person making it at the time when he makes it, A.I.R 1929 L 561, A.I.R 1930 R 177, (1892) 1 Q.B 431 referred to).

(4) I.L.R (1943) 1 C 250 : 47 C.W.N 627.

certain royats in the zemindari petitioned the tehshildar for his retention imputing criminal acts to the zemindar. It was found that the communication was made bona fide and that there was some ground for some of the imputations. The petition was privileged (1). It is well recognised in certain societies that the members of the caste as a Panchayet have a right to exercise control over the moral conduct of all who are in the caste. In order to exercise that right they are deemed to have the power to make enquiries and come to some conclusion which if adverse to the person concerned will lead to his being excluded from intercourse with other members of the caste. That being so, it naturally becomes the moral duty of all members of the caste to assist in such enquiries and to give such information which they believe in good faith that they possess, and the information so given is privileged (2). There must exist a true occasion for the exercise of the duty. On a cheque for £2-15-8 drawn by the plaintiff, the defendant Bank wrote 'not sufficient' although there were funds in the account. The plaintiff sued the defendant for damages for libel, the words, it being contened, conveyed a reflection on his business. The defendant pleaded that the occasion was privileged being in the exercise of their duty as

Enquiries into caste questions.

True occasion for exercise of duty.

Illustrations.

(1) 12 M 374.

(2) 1938 A.L.J 638 : 1938 A.W.R 415 : 176 I.C 797 : A.I.R 1938 A 447.

Bankers, the words which were in fact false, having been put in the belief that they were true. It was held that the plea of qualified privilege must fail, for in the circumstances, as there were funds, the only duty was to pay and none for any communication, for one cannot by making a mistake create the occasion for making a communication and the plaintiff was awarded £250 as damages (1). The foreign manager of a company wrote to the defendant, a director, that the plaintiff, a managing director, was familiar with a housemaid. The defendant sent the letter to the Chairman of the Board of Directors and also showed it to the plaintiff's wife, and as a result the plaintiff and his wife separated. The plaintiff sued the defendant for defamation. The defendant pleaded that the publication was made in circumstances which made the publication privileged. It was held that there might be a duty to communicate to the chairman, but there was no duty to communicate to the wife and so it was not privileged (2).

Answering queries.

An important kind of duty which will give privilege to a defamatory statement is the duty of answering queries made by some person having a lawful interest in the matter. Thus an employer may answer questions as to the character of a former servant asked by any person proposing to

Answering questions as to character of a servant.

(1) (1940) 1 All E.R 342 (C.A)
(2) (1930) 1 K.B 130 : 98 L.J.K.B 711.

engage that servant (1). The employer is under a moral duty to disclose the servant's character and any statement made bona fide and without malice is privileged (2).

as to solvency of a trader.

Similarly one trader may answer the enquiries of another as to the solvency of a third with whom the second proposes to do business (3). It is in the interest of society that the question should be answered and if answered bonafide and without malice, it will be privileged (4). So also an

as to commission of crimes.

accusation of crime is privileged if made in reply to questions asked by the police with a view to detecting an offender (5). Statements made bonafide and in honest belief to a police officer in the course of an

as to names of bad characters.

enquiry as to the names of bad characters similarly carry with them a qualified privilege (6).

(1) (1864) 16 C.B (N.S) 827.

(2) (1786) 99 E.R 1001, (1836) 175 E.R 609. Even a voluntary statement about the servant's character will be privileged, (1803) 127 E.R 317. But see (1838) 173 E.R 642 contra. See next page, bottom.

(3) (1878) 38 L.T (N.S) 423. See (1908) A.C 390

(4) (1881) 7 Q.B.D at p. 622.

(5) (1838) 3 M. & W 297 : 49 R.R 603, (1884) 1 T.L.R 19, (1849) 113 E.R 460 : 52 R.R 371, 11 O.W.N 122 : 148 I.C 427 : A.I.R 1934 O 8, 72 I.C 57 : A.I.R 1923 O 247. See (1836) 132 E.R 179. See p. 93.

(6) 7 L.B.R 64 : 22 I.C. 273, 6 Bur. L.T 100 : 20 I.C 290 (if the plaintiff succeeds in proving actual malice, even then it is open to the defendant to show that the statement is true), 28 C 794 : 5 C.W.N 804. See 49 M 315 : 50 M.L.J 460 : 23 L.W 327 : 93 I.C 8 : A.I.R 1926 M 521. Even though there is no reasonable ground for his belief, 8 Bur. L.T 278 : 30 I.C 930. See 13 M 34, 1 Bom. Ap. 85, also 1 Hay 539 : Marsh 234, 32 C 318 : 8 C.W.N 731, 11 C.W.N 390 (if bonafides established, express malice must be proved). The onus of proving good faith is on the person making the imputation, 4 W. R. Cr. 22, 2 Agra 87. See 11 W.R 534, see also 1942 A.L.W 696 (voluntary statement made malafide at police investigation after first information not privileged).

But a communication which is volunteered, without any enquiry on the part of any one having a lawful interest, is not privileged, unless there is some such confidential or other relation between the parties as creates a duty to speak without being asked. Thus the relation of master and servant will justify the servant in telling his master facts which concern his interest in relation to the matters entrusted to the servant (1). For the same reason, a father or a near relative may warn a lady as to the character of the man whom she proposes to marry (2). So also a communication from a clergyman to a lady attached to his mission that he is not prepared to celebrate her marriage with the plaintiff, he being unworthy of her is privileged (3). Similarly a host owes a duty to his guest which will justify him in warning his guest against a servant suspected of dishonesty (4). Where a person who has information which materially affects the interests of another tells that other what he knows with the honest purpose of protecting his interests and in the full belief that his information is true, such information, though volunteered and made to a complete stranger is privileged (5). A statement volunteered by one to another

Volunteered communications not privileged, except where there is a duty to speak.

Duty of servant to master.

of father to daughter.

of clergy to laity.

of host to guest.

Other cases.

(1) (1869) L.R 4 Q B 262, (1855) 5 E. & B. 328.
(2) (1837) 8 C. & P. 88 : 56 R.R 834, (1884) 1 T.L.R 84.
(3) 83 P.R 1908 : 26 P.L.R 1909 : 152 P.W.R 1908 : 4 I.C 918.
(4) (1891) 2 Q.B 341.
(5) (1846) 135 E.R 1069 ; 69 R.R 530. See (1891) 2 Q.B at p, 352, pe Lindley J.

that he believed a third person whom the other was about to employ guilty of dishonesty and felony, is privileged (1). This is upon the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest (2).

Communications between members of borough council.

So also the members of borough councils and other public bodies are privileged in respect of communications made to one another in the honest fulfilment of their functions (3). Where the water works committee of a municipality in their report about water supply which was their care, made an allegation against the plaintiff that he obtained using threats to municipal employees supplies of water at unusual hours and the allegation was found not to be true, the members of the committee were protected (4).

Report of water works committee.

Exception as to business communication by trade protection companies.

But a trade protection company whose business it is to make, on behalf of its clients, enquiries into the financial position of persons with whom those clients propose to deal, possesses no privilege, and carries on such a business at its own peril (5). It is

(1) (1803) 127 E.R 317. There is also the contrary view, see (1838) 173 E.R 642, (1878) 38 L.T 423.

(2) (1863) 143 E.R 838 : 137 R.R 572, per Erle C.J.

(3) (1895) 1 Q.B 848.

(4) 73 I.C 39 : A.I.R 1923 N 226. But see 1 B 477 (resolution of the Trustees of the Port of Bombay accepting accounts as made by the plaintiff but adding that any further transactions with him should be avoided if possible amounted in law to libel, though the publication was privileged).

(5) (1908) A.C 390.

true that in such a case the information complained of as defamatory is supplied at the request of persons having a lawful interest in the matter, but this request is itself solicited as a matter of business by the defendant and therefore imposes on the defendant no such duty as is required in order to give rise to privilege. Statements by persons who profess to be collectors and suppliers of information as a matter of business must be deemed to be volunteered (1).

Statements in self defence.

Even when there is no duty to make the statement, it is nevertheless privileged if it is made in the protection of some lawful interest of the person making it; for example if it is made in the defence of his own property or reputation (2). So that if what the defendant wrote was written bona fide in answer to an attack made on him by the plaintiff and for the sole purpose of defending himself from such attack, the occasion is privileged (3), as also if it is a statement honestly made to protect one's own interest (4). Similarly notices between solicitors are privileged (5). The privilege attaches not only to one acting in self-defence, but also to an agent acting for a

(1) 12 C.W.N 1053 : 19 M.L.J 20 : 4 M.L.T 1 : 1 I.C 348 P.C

(2) (1876) 1 A.C 307, (1887) 4 T.L.R 159, (1834) 149 E.R 1044 : 40 R.R 523.

(3) 32 C 318 : 8 C.W.N 731. See 35 C.W.N 271 : 52 C.L.J 345 : 129 I.C 863 : AIR 1931 C 81, (1836) 173 E.R 234, (1872) 4 P.C 495.

(4) 3 A 13, 815, 15 B 351, 9 C.W.N 195
(1906) 8 F 205.

principal, or a solicitor acting for his client (1). The language of the defence is not to be weighed in nice scales and may be intemperate, even violent (2), but should not with impunity make unnecessary and irrelevant imputations against the assailant (3).

nguage of fence.

e true position.

It is we established that a person making a communication on a privileged occasion is not restricted to the use of such language only as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege ; on the contrary, he will be protected even though his language should be voilent or excessively strong if having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

e deviation n necessity material.

The fact that some expressions went beyond what was necessary for self-defence would not afford evidence of malice. The language of a privileged communication should not be subjected to a strict scrutiny, especially when the offending matter (newspaper article) is a rejoinder to a violent and untrue attack by the plaintiff on the defendant and in uncontrolled language. In such a case, he cannot ask the Court to

(1) (1894) 1 Q.B 838, (1835) 150 E.R 244 : 41 R.R 788, 56 C 1013 : 33 C. W.N 446, 20 L.W 779 : 85 I.C 44 : A.I.R 1925 M 246.

(2) (1917) A.C 309.

(3) (1858) 4 Jur 1039.

weigh the offending article in nice scales and contend that he was injured because the rejoinder containd an expression here and there which may not be absolutely necessary or in accoodance with truth, when he has by his attack deliberately held the defendant up to public reprehension and contempt. Malice can be proved by extrinsic evidence or by the language of the article itself. It is for the plaintiff to prove malice and if he fails to prove malice, he fails in his action. Malice in such case is an indirect motive. Motive to defend is no evidence of malice. Nor would falsity of facts be necessarily evidence of malice. Negligence in publishing is also no evidence of malice nor is mere want of sound judgment. Honest belief is protected.

The proper approach.

The only proper approach is to look at the situation as a whole and to consider whether what the defendant did was reasonably necessary having regard to all the circumstances. If there has not been too great severity or redundancy in the expression used, and if there is no proof of malice independently of the article complained of, the plea of privilege would be a complete defence to the action (1).

Master warning servants against their associates.

A master has a sufficient interest in the honesty of his servants to be privileged in warning them against the character of their

(8) 48 Bom L.R 882

Landlord complaining to tenant and vice versa.

associates (1). A tenant may make complaint to his landlord of the conduct o persons employed by the latter to effec repairs to his premises (2). Conversely, landlord may complain to his tenant of th conduct of the latter's lodgers as having tendency to bring the house into disreput (3). Similarly statements made for redres of grievances to persons in a position o authority over the plaintiff are privileged Thus where the creditor of an army officer addressed the Secretary for War complaining of the officer's conduct in respect of the debt, the statement was privileged (4). But the statement must be addressed to the proper person, for if addressed to a wrong person, the privilege will be lost (5). Some ratepayers wrote to the Board of Guardians of the Poor mistaking they were the persons to receive it, a letter complaining of certain malpractices during the election of the plaintiff as a guardian of the poor ; there though the ratepayers were interested in making the communication, the Board was not also interested not being the proper body and so the communication was not privileged (6).

Statements for redress of grievances to persons in authority.

Complaint against public officers.

The same principle is applicable even when the interest of the defendant is

(1) (1851) 10 C.B 583, (1891) 2 Q.B 189.
(2) (1834) 1 C.M. & R 181 : 40 R.R 523.
(3) (1834) 1 A & E 43 : 40 R.R 247.
(4) (1822) 106 E.R 1325 : 24 R.R 514.
(5) (1894) 2 Q.B 54, see (1856) 119 E.R 509 : 103 R.R 507.
(6) (1894) 2 Q B 54. See also (1917) A.C at P. 320.

merely the general interest which he possesses in common with all others in the honest and efficient exercise by public officials of the duties entrusted to them. Thus any member of the public may make charges of misconduct against any servant of the crown and the communication will be privileged (1); but the charge must be made to the proper persons, that is to say, to those who have the control of the official whose conduct is impugned. A communication to a wrong person, and *a fortiori* a publication of the complaint to the world at large in a newspaper or otherwise, is an excess of privilege, and the privilege will be thereby forfeited (2).

When privilege forfeited.

This privilege of making complaints against public officials must not be confounded with the privilege of making fair comments in matters of public interest. The former deals with false and defamatory statements of fact and not with defamatory comment on proved or admitted facts. A comment may be published to all the world; a specific charge of misconduct must be published only to the persons in authority over the offender. Where a communication is privileged, the fact that incidentally and in the normal and reasonable course of business it has been published to strangers,

Complaint and fair comment.

Privilege not destroyed by subsidiary publication.

(1) (1855) 5 E & B 344.

(2) (1878) 2 C.P.D 215. See (1838) 173 E.R 470 (letters to newspaper about an election, instead of at the constituency, excessive publication), (1874) 9 C.P 393 (communication sent by telegram, instead of by post, there was excessive publication), but see (1907) 1 K.B 371 contra.

does not destroy the privilege. Thus a matter which is libellous may have been printed (1), or transcribed by a clerk (2). Such subsidiary publication does not create liability, provided it is reasonable and in the normal course of business (3). Similarly, the mere fact that when the defendant speaks out on a privileged occasion, strangers happen to be present will not amount to publication to them, so as to destroy the privilege (4).

Where both parties interested in the communication.

Where both parties are interested in the communication the occasion is privileged. If there co-exists an interest in the subject-matter of a communication both in the party making and in the party to whom it is made, the occasion is privileged (5).

Joint owners, partners, shareholders.

So joint owners of property, or partners in the same business, or shareholders in the same company, may make privileged communications to each other in defence or furtherance of their common interest (6).

Communication between client and pleader.

Thus, where the defendant as client writes to his pleader a letter containing accusation of professional misconduct and the letter is written by his clerk so that there is publication and there is consequently

(1) (1869) 4 Q.B 262

(2) (1894) 1 Q.B 842 (Solicitor dictating to his clerk letter defamatory of the plaintiff, no publication, no loss of privilege). See also (1907) 1 K.B 371, 32 P.L.R 772 : 134 I.C 515 : A.I.R 1931 L 246.

(3) (1930) 2 K.B 226, (1918) 2 K.B 677, (1891) 1 Q.B 524.

(4) (1891) 1 Q.B 474, (1840) 113 E.R 460 : 52 R.R 374, (1848) 1 Ex. 743. See also (1935) 69 M.L.J 9 (notes).

(5) 36 C 907 : 13 C.W.N 1165 : 3 I.C 831, 2 Hyde 274 : Cor 134.

(6) (1869) L.R 4 Q.B 262, (1882) 20 Ch.D 501.

defamation but being a communication in which both are intrested is privileged (1). Similarly, an imputation of a crime made in good faith by an employee against his employer communicated to a co-employee with a view to their making enquiries in the matter, is privileged, being a communication made in the interest of the communicator and to protect a common interest (2). Conversely, where an employer who has dismissed a servant for misconduct, communicates the fact of the dismissal together with the reasons therefor, to other servants, it is a case of reciprocal interest, for the other servants are certainly interested in knowing what constitutes misconduct sufficient to merit dismissal (3). An employer having dismissed a servant, because some articles were found missing from the house, called the other servants and told them of the fact of the dismissal and the reasons therefor. It was privileged (4). A house had been insured against fire by the owner. The house was in the occupation of a tenant. The house was destroyed by a fire and with it the tenant's furniture which were uninsured were also destroyed. The tenant suspected incendiarism and reported to the Insurance Company that

Between co-employees concerning employer.

Employer communicating to employees reasons for dismissing one employee.

Tenant of house communicating with insurance company.

(1) 24 M.L.J 8 : 12 M.L.T 377 : 16 I.C 736.

(2) 42 M 132 : 35 M.L.J 673 : 24 M.L.T 461 : 9 L.W 104 : 1919 M.W.N 113 : 49 I.C 630 (whether repetition will destroy the privilege depends on the circumstances of each case).

(3) (1891) 2 Q.B 189.

(4) (1851) 138 E.R 231: 84 R.R 709.

in his opinion it was at the instigation of the owner of the house. There the tenant had a common interest with the Insurance Company and the accusation was privileged (1). So a communication made bonafide upon any subject matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains incriminatory matter which without the privilege would be slanderous and actionable. Where therefore the defendant gives a near relation information, slanderous in the absence of privilege, of the conduct of the wife of the plaintiff, who is another relation, the communication is privileged, as it is given in confidence, although it is not so stated expressly in the letter itself (2). Similarly, a statement by one person to an intimate friend as to the character of a doctor attending on the latter is privileged (3). But a statement made to the Head Master of a school that a former master had been, while in service, seen drunk in the streets one day, would not be privileged, as there was no duty or interest to make the statement when the man was no longer in the school (4).

Information given in confidence.

Statement to friend about attending doctor.

No privilege where no interest or duty.

(1) 8 Bur. L.T 278 : 30 I.C 930.
(2) 4 B R 468 : 174 I.C 642 : A.I.R 1938 P 164.
(3) (1860) 29 L.J Ex. 125,
(4) (1897) 13 T.L R 301.

Privilege lost by malice.

This privilege, like all cases of qualified privilege, is lost by malice, that is if untrue. A creditor (himself an officer in the services) wrote to the commanding officer of his debtor who owed some rent, a letter in which he said 'should he (the debtor) persist in refusing payment there seems to be no alternative to the very unpleasant one of taking the matter to Court.' The debtor brought an action for libel. It was held that though a mere statement that the plaintiff was indebted to the defendant could not be held to be defamatory apart from some special circumstances, the words complained of impute to the plaintiff a deliberate intention to avoid payment of rent as long as possible and to suggest that he was not likely to pay unless he was compelled by legal proceedings, and being untrue were defamatory. As the commanding officer has a common interest in the discharge of his liabilities by the plaintiff in the interest of the reputation of the services the occasion is privileged : but by reason of the express malice of the defendant the communication was taken out of the protection afforded by the privileged occasion (1).

(1) (1943) K.B 319 : 112 L.J (K.B) 430.

CHAPTER X

PARTIES IN AN ACTION FOR I IBEL

Who may sue for libel.

Ordinarily the person defamed has alone the right of action and the fact that the defamatory statement has caused injury to other persons (being members of the same family) does not entitle them to sue (1). So that a father cannot sue for defaming his daughter (2), nor a brother for libel on his sister (3), nor an heir or nearest relation of a deceased person for defamatory words spoken of the deceased (4). And according to the Madras High Court a husband connot either sue for defamatory words imputing unchastity to his wife (5) ; but the Calcutta High Court has taken a distinctive view in the light of the peculiar circumstances of this country and has held that a suit will lie by the husband for imputing unchastity to his wife (6). Where the defamatory words to one person impliedly contain an imputation against

Father for defamation of daughter.

Brother for defamation of sister.

Relations for defamation of deceased relative.

Husband for defamation of wife.

Defamatory words to one with implied imputation against another.

(1) 5 B 580.

(2) 11 A 104. See 1 Agra 264.

(3) 1 M 383. See 26 M 43. According to the Calcutta High Court in case of defamation of a Hindu widow her brother may be the complainant and bring a criminal case if the words tend to a breach of the peace, 32 C 425 : 8 C.W.N 515.

(4) 5 B 580.

(5) 18 M 250, 5 M.L.J 65. According to the Bombay High Court, the husband may be the complainant and bring a charge of defamation in a Criminal Court if the words tend to a breach of the peace, 25 B 151 : 2 Bom. L.R 665.

(6) 34 C 48 : 4 C.L.J 388. The same in U.P and Burma, see p. 22. But see 4 C.L.J 290 (the husband could not sue where the defendant wrote to him saying that his wife was a witch).

another, the latter is competent to maintain a suit (1).

Where defamatory words are published about persons who are dead, ordinarily no action will lie (2). But where they are published with the intention of injuring their posterity and creating a breach of the peace, it will amount to a criminalo ffence and the offender may be prosecuted in the criminal court for defamation (3). If a person who is defamed, dies, his successors cannot bring an action, for defamation is a personal injury for which the cause of action does not devolve on the heir.

Defamatory words about dead person

If person defamed dies, heir cannot sue.

In England, under the Married Woman's Property Act, 1882, women can now own property and so can sue or be sued in respect of such property. But under section 12 of the Act a wife cannot sue her husband for tort. So a wife can sue her husband for injury to her property but cannot sue him for tort to her person. The saying is "a husband may with civil impunity break her leg but not her watch". In England thus a wife cannot sue her husband for assault or libel even where it imputes unchastity (4). In India women's right to own property on her on account absolutely has been recognised from time immemorial.

Libel against wife by husband.

(1) 32 C 1060: 9 C.W.N 847: 2 C.L.J 396. See 3 4 C.W.N 189 (n), (1722) 93 E.R 641, (1723) 88 E.R 89.

(2) 5 B 580,

(3) (1791) 100 E.R 931 : 2 R.R 343, (1887) 37 T.L.R 366.

(4) (1930) 2 K.B 238 : 99 L.J.K.B 266.

As to other matters husband and wife are considered in their mutual relations to be one indivisible person and so it would appear one cannot sue the other for tort.

Statement defamatory of several persons.

Where a statement is defamatory of several persons, each of such persons is entitled to sue separately (1) ; rather they must sue separately and cannot jointly sue the defendant (2). Where, however, a firm is defamed all the partners should join as plaintiffs, as the damages sued for are for the injury done to the joint business (3).

Defamation of firm.

Defamation of Corporation.

But a corporation being a legal body its members cannot sue individually. And since it is a legal entity which has 'neither a body to be kicked nor a soul to be damned' it cannot ordinarily sue for defamation. But a statement may tend to cause damage to the property or business of a corporation, and so it has been held that a corporation may maintain a suit, provided that the statement, if made about a private individual would be defamatory and that it tends to cause damage to the property or business of the corporation (4). Where several persons have contributed to the publication of the libel, each is liable for the entire publica-

Where several persons liable, one suit against all.

(1) 48 C 304 : 25 C.W.N 150 : 63 I.C 467.

(2) 34 C 662 : 11 C.W.N 680 (if they sue together, they should be given to elect as to who should carry on the suit and the plaint amended). See 35 C 728 : 12 C.W.N 373, 15 B.L.R 161, 166 (n).

(3) 36 C 907 : 13 C.W.N 1165 : 3 I.C 83. See 8 R 250 : A.I.R 1930 R 177 (an unincorporated association cannot sue, a corporated association cannot either sue for injury done to members before incorporation).

(4) (1859) 157 E.R 769. See 37 Bom L.R 1033 : 161 I.C 769 : A.I.R 1936 B 114.

tion, and so there may be one action against all the defendants jointly (1); or the suit may be against one of them to which the others need not be joined unless they are also necessary parties. There cannot be separate suits if the cause of action is one and indivisible, for in that case the extinguishment of the cause of action against one involves extinguishment of the cause of action against all (2). For instance, the editor, printer and publisher of a newspaper in which a defamatory article is published are each individually liable, though they need not be all joined in the suit unless a plea of non-joinder is raised but there cannot be separate suits as the cause of action is one and indivisible (3). Not so however in the case of slander where each person is responsible only for what he himself has uttered and separate suits must be brought against each, though where the words are not actionable per se, but produce a joint result, all the defendants may be sued together (4). See O. 1, R. 3 Civil Procedure Code, 1908. See also "By the defendant" p. 64.

Separate suit in slander.

(1) 15 B.L.R 161 (166). Where two or more persons join in defaming another, all of them may be sued as joint tortfeasors, 1934 A.L.J 43 : 3 A.W.R 161 : 147 I.C 982 : A.I.R 1934 A 203. See 117 I.C 884 : A.I.R 1929 L 129.

(2) 152 I.C 398 : A.I.R 1934 N 226.

(3) 152 I.C 398 : A.I.R 1934 N 226.

(4) 15 B.L.R 166 (n).

CHAPTER XI

JUDICIAL PROCEDURE

On the presentation of a plaint for damages for libel, the court is to see whether the alleged libellous matter set out in the plaint does really amount to libel; if it does not, there is no cause of action and the plaint will not be admitted (1). See O. 7, R. 11, Civil Procedure Code. The plaintiff must give in the plaint particulars as to when and where the libel was published and the persons to whom it was published (2). If all the persons to whom the publication was made are not known to the plaintiff, he may plead that he is unable to give the particulars until after discovery (3). Such particulars will obviously be unnecessary if the libel is published in a newspaper (4). Besides, since the defendant is entitled to know the precise charge against him, the exact words constituting the libel must also be set out (5). If it is contained in letters or in articles in newspapers those letters and articles

Particulars to be given in plaint.

Plaint to give exact words constituting the libel.

If contained in letters or articles these should be produced.

(1) 18 W.R 516 : 10 B.L.R 71.

(2) 6 Bom L.R 131, 95 I.C 89 : A.I.R 1926 A 672 (the plaint must not be vague), (1893) 1 Q.B 185, (1886) 16 Q.B.D 656. It is essential to allege publication (to a third party) or circumstances as will lead the court to presume publication to a third party, 194 I.C 119: A.I.R 1941 C 247.

(3) (1913) 2 K.B 200 n.

(4) (1876) W.N 106 (Eng.).

(5) (1879) 4 C.P.D 125, (1795) 3 R.R 142, (1870) 22 R.R 465.

should be produced (1). If the letter containing the libel is destroyed, the fact must be stated and secondary evidence as to its contents may be given (2). Where an innuendo is alleged, the same must be set out with the libellous meaning which it is alleged is attached to it (p. 40-3). The rules of discovery and interrogatories apply and may be availed of. As to interrogatories, where the answers might tend to incriminate the defendant, he is entitled to refuse to answer. But the mere fact that a party or a witness swears that the answers would tend to incriminate him is not conclusive, but the court has a duty, and may in the interest of justice compel him to answer. The court will insist upon an answer if the witness is trifling with the authority of the court and availing himself of the rule of law to keep back the truth having in reality no ground whatsoever for claiming the privilege. The power of the court to insist on an answer is not limited to a case of malafides but extends to any case in which it is not made to appear to the court that there is reasonable ground to apprehend danger to the witness on his being compelled to answer (3). The rule repeatedly laid down in practice according to which discovery of the names of a newspaper's informant ought not to be enforced

Innuendo must be set out.

Rules of discovery and interrogatories apply.

Where defendant may refuse to answer.

When court may compel a witness to answer.

Discovery of a Newspaper's informant.

(1) (1846) 8 Q.B 823.

(2) L.R 1 Q.B 628 (Atkinson v. Fosbroke)

(3) (1939) 2 All E.R 613 (C A) : L.R (1939) 2 K.B 395 : 160 L.T 595: 55 T.L.R 724 : 1939 W.N 211.

in the absence of special circumstances, doe not apply to a case where the defence o fair comment is raised by a defendant wh is not sued as the owner or publisher of a newspaper but in his individual capacity as the author of a defamatory publication in the newspaper. He can properly be interrogated, not only as to the information he had when he wrote the alleged libel and as to what precautions he had taken to verify his information, but also as to the identity of the informant (1), so long as they are within the scope of relevancy for the purpose of discovery as defined by Lord Esher in Marriot v. Chamberlain (17. Q B. D 154).

Illustration. The defendants were the printers and publishers of a weekly newspaper. The plaintiff brought a suit for damages for defamation against the defendants for publishing the following words in the paper, "Plane smuggling : The New Rocket and it was an Englishman who started it," by which words it was alleged the defendants meant and were understood to mean that the plaintiff constantly engaged for some time past in plane smuggling, (defendants applied for particulars in writing stating the facts and matters from which it was to be inferred that "Englishman" referred to the plaintiff and the words were published of the plaintiff. It was held that

(1) (1937) 2 K.B 690 : 106 L.J (K.B) 555 : 157 L.T 93, (1920) 1 K.B 135. relied on.

since the plaintiff could succeed only by showing that there were some facts or circumstances which justified reasonable people who read the article in construing the words as referring to the plaintiff, such facts were therefore material facts and should be stated in order to show that the plaintiff had a cause of action against the defendants and to enable the defendants either to admit or deny or otherwise plead a defence (1). Witnesses can be called to prove that they understood the words to refer to the plaintiff ; but they cannot be asked what meaning they attached to the words, because it is the very question the jury have to decide. Where such questions have been allowed to be put without any objection, it would be too late to raise the question in the appellate court of their admissibility as a ground for setting aside the verdict of the jury (2).

Witnesses to prove reference to plaintiff.

The plaintiff must of course aver the failsity of the defamatory statement, but since, as already noted, a defamatory statement is presumed to be untrue (p. 48), it is not neccessary for the plaintiff to give affirmative evidence of the falsity of the imputation (3).

As for the defendant, if he pleads justification, he must state in his pleadings the facts on which he relies in support of his

Defendant to state his facts if he pleads justification.

(1) (1936) 1 K.B 697 : 105 L.J (K.B) 318 : 154 L.T 423.
(2) (1946) 1 M.L.J 152 : 59 L.W 111 : A.I.R 1946 P.C 13.
(3) 12 W.R 372.

plea (1). Thus where the libel consists in imputing fraud, he must mention the persons who were defrauded (2). He cannot refuse to give particulars because that would disclose his evidence (3). He cannot either deliver interrogatories or apply for discovery without giving particulars (4). As has been said, the plea must be as broad as the libel. If the words themselves are so specific or precise that the plaintiff must know from them what the charge is, no further particulars are required. There is no absolute rule of practice that whenever a plea of justification is raised in the common form an order for particulars must be made in a general form (5). The defendant must besides state whether the justification is as to the whole or a part of the libel (6) ; and where the libel is capable of two meanings, whether he justifies both the meanings, or only one, and if so which one (7). Where an author sent his book for review to the editor of a journal and the latter in reviewing the book said among other things the following, namely, that the author was by his own confession a most barefaced liar, the editor, if he pleads justification, must specify in his pleadings the passage in the

Cannot apply for discovery without giving particulars.

Where particulars not required.

No absolute rule

Justification of whole or part.

Where libel has two meanings.

Review of book.

(1) (1893) 2 Q.B 183. See also (1926) 2 K.B 273. It is not necessary if the libel consists of one specific charge, (1891) 2 Q.B 532.

(2) (1893) 2 Q.B 183 (187), (1902) 18 T.L.R 763 (764), (1842) 152 E.R 510 : 62 R.R 654.

(3) (1913) 3 K.B 499.

(4) (1873) 8 C.P 362

(5) (1939) 2 All E.R 605 (C.A) : 160 L.T 520 : 55 T.L.R 699 : 1939 W.N 182.

(6) 23 Q.B.D 388 (Fleming v. Dollar)

(7) (1888) 57 L.J.Q.B 594, (1868) 3 Q.B 396, (1898) 23 Q.B.D 388.

book on which he relies in support of the defence of justification (1). If the defendant pleads fair comment in the form of what is termed 'a rolled up plea' (p. 118), namely, by saying that 'in so far as the said words consist of allegations of fact, the said words are in their nature and ordinary meaning true in substance and in fact, and in so far as the said words consist of expression of opinion, they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest', the plea indicates the materials on which the comment is based, so that the plaintiff is thereby given all the information on the subject that he can require and the defendant will not be required to specify the words upon which he relies as being statements of fact and as being expression of opinion, nor to give particulars of the facts on which he relies as the basis of his comment (2). If the materials are not indicated the defendant may be ordered to give such particulars (3). The defendant cannot raise a new defence of which the plaintiff has no notice, after the commencement of trial (4).

Where fair comment pleaded in the form of rolled up plea.

No new defence after commencement of trial.

A plaintiff in an action for defamation can be cross-examined as to credit. But when

Cross-examination of plaintiff.

(1) (1891) 2 Q B 582.

(2) (1924) 1 K.B 675. See 54 C 73 : 101 I.C 505 : A.I.R 1927 C 1[illegible] appeal 55 C 1121 : 32 C.W.N 490 : 113 I.C 834 : A.I.R 1928 Cal.

(3) (1924) 1 K.B 675 ibid.

(4) 36 C 883 : 13 C.W.N 895 : 6 M.L.T 73 : 3 I.C

there is no plea of justification and the defendant gave notice of his intention to call evidence in mitigation of damages, it is not open to the defence to give evidence or cross-examine the plaintiff as to previous convictions for other offences to get in facts in mitigation of damages (1).

Trial of defamation cases in Native States.

In an Ajmere-Marwara case it has been said that in view of the technical and complicated nature of the law relating to the offence of defamation, it is very necessary in the interest of justice that no magistrate who does not possess the requisite legal training and a university degree in law should be authorised to try such cases (2).

Limitation for suit.

The limitation for an action for libel is one year from the date of publication (Article 24, Schedule 1, Limitation Act, 1908). Note, it is to run from the date of publication, not merely first publication, so that every fresh publication will give a fresh start for limitation (3). See also p. 63.

Fresh limitation for every fresh publication.

(1) (1945) 1 All E R 563 (C.A).
(2) 1945 A.M.L.J 77.
(3) (1849) 14 Q.B 185, at pages 187-189.

CHAPTER XII

REMEDIES

In libel damage is presumed (1). The remedy for a libel thus is by way of damages, and the plaintiff in a suit for libel is awarded damages. Damages the remedy.

Damages may be either, (a) general, that is by way of a solatium for the humiliation caused by the libel, or (b) special, that is damages for the actual loss suffered. The plaintiff may claim both general and special damages, that is, solatium for the humilation and damages for the actual loss suffered. It is to be noted that in an action for libel the damages awarded are for the most part, often entirely without any real connection with any pecuniary loss at all. One only considers the injury which the plaintiff has suffered, which may or may not be capable of pecuniary valuation. When dealing with a type of damages upon which there can be a very wide divergence of opinion, care should be taken to avoid either of the two extremes, or falling into what may be described as 'an entirely erroneous estimate'. And what an appellate court must avoid doing is to substitute its own opinion as to what it would have awarded for the sum which has been awarded General and special damages.

Caution.

Appellate court's function

(1) 42 C.W.N 1045, (1946) 1 M.L.J 152 : 59 L.W. 111 : A.I.R 1946 P.C 16.

by the court below (1). Where however it is so excessively high or so inadequate as to amount to a wholly incorrect estimation, an appellate tribunal will interfere (2). Although the assessment of damages is particularly within the province of the jury, the amount must bear some relation to the injury suffered (3).

Damages to bear relation to injury suffered.

Nomiual, substantial, exemplary damages.

General damages may be nominal or substantial, or even exemplary. In libel (unlike slander) the damages are at large, no particular damage need be proved and damages may by given having regard to the conduct of the parties and all the circumstances of the case (4). Nominal damages will be awarded only when the plaintiff is content to clear up his character and does not care to put money into his pocket (5). The existence of unproved rumours does not justify slight damages (6). Evidence of general bad character may be given in mitigation of damages (7). The state of mind of the defandant at the time when he made the statement, e.g., his credulity or bonafides may also be proved in mitigation of damages (8).

Nominal damages.

Mitigation of damages.

Substantial damage.

When it is not a case of nominal damage, ordinarily substantial damages are award-

(1) (1941) 1 All E.R 297 (C.A), Rook v. Fairrie.
(2) 59 L.W 111 : (1946) 1 M.L.J 152 : A.I.R 1946 P.C 13.
(3) Ibid.
(4) 15 Bom. L. R 130 : 19 I. C 98.
(5) 22 L. W 26 : 85 I. C 900 : A. I. R 1925 M 950.
(6) 7 Bur L. T 155 : 24 I. C 749.
(7) 4 L 55 : 2 P. W. R 1923 : 73 I. C 805 : A. I. R 1923 L 225.
(8) 168 I. C 853 : A I R 1937 R 105.

ed (1). Indeed, the question of damages varies with each case according to its own particular facts. So where the libel is a savage, gross and vindictive one which has been persisted in upto the last, the Court will be justified in awarding the plantiff substantial damages (2). Where a newspaper article contained defamatory statements of facts which were not proved and which in no sense could be considered fair comment, the defendant was liable and the mere fact that he bonafide believed them to be true was immaterial and the plaintiff would be entitled to have substantial damages (3). Damages for defamation however should not be on an extravagant scale though it may be punitive (4). In libel damage is presumed (p. 165), and no doubt punitive or, as they are sometimes called, vindictive damages may be given, but extravagance is not to be permitted (5). It is only in extreme cases that exemplary damages may be awarded. Where no private malice or personal grudge has been proved and the defendant has acted throughout in the public interest exemplary damages cannot be awarded (6). Indeed, the doctrine of exemplary damages should not be introduced in India and En-

Not extravagan

Punitive or vir dictive damage:

Exemplary damage.

(1) 22 L. W 26 : 85 I.C 900 : A.I.R 1925 M 950.

(2) 7 L 491 : 27 Punj L. R 812 : 99 I. C 300 : A. I. R 1927 L 20.

(3) 55 C 1121 : 32 C. W. N 490 : 113 I. C 834 : A. I. R. 1929 C 69 (on appeal 54 C 73 : 101 I. C 565 : A. I. R. 1927 C 297).

(4) (1943) 1 K. B 80 : 112 L. J (K. B) 176 : (1942) 2 All E. R 555.

(5) 59 L. W 111 : (1946) 1 M. L. J 152 : A. I. R 1946 P. C 13.

(6) 22 L. W 26 : 85 I.C 900 : A.IR 1925 M 950, 37 Bom L. R 1033 : 161 I.C 769 : A.I.R 1936 B 114 (malice material in assessing damages).

glish decisions on the law of libel should not be accepted as precedents for Indian Courts, unless they are in consonance with justice, equity and good conscience (1).

Discretionary.

Damages in an action for libel are entirely discretionary. It is the rule of law in actions for libel that in assessing the damages the whole conduct of the defendant from the time the libel was published down to the very moment of the verdict should be considered. A plea of justification if set up and persisted in, must be proved strictly and it will tend to aggravate the damages if the defendant fails to prove it (2). If the attack was unprovoked and the defendant was culpably reckless, or grossly negligent in the matter, and his subsequent conduct is no better i. e., if he would not accept an explanation, nor retract the charge or does so only tardily, it will aggravate the damages (3). The conduct of the defendant in the course of the proceedings thus are considered in assessing the damages, but such conduct is only the conduct in the first Court, the repetition in the Appellate Court of the defence in the Court below cannot be considered as aggravating conduct(4). Besides, the character of the defama-

Aggravation of damages.

Defendant's conduct.

Conduct in first Court.

(1) 33 M. L. J 392 : 21 M. L. T 324 : 5 L. W 598 : 40 I.C 126.

(2) 11 L 45 : 117 I. C 90 : A. I. R 1929 L 561, 152 I.C 398 : A. I.R 1934 N 226 (an unjustified plea of justification is a good ground for depriving a party of his costs though he succeeds on other pleas). See 55 C 1121 : 32 C. W. N 490 : 113 I. C 834 : A. I. R 1929 C 69. See p. 69.

(3) 36 C 883 : 13 C.W.N 895 : 6 M.L.T 73 : 3 I.C 224 (on appeal 37 C 760 : 14 C.W.N 713 : 6 I.C 81).

(4) 22 L. W 26 : 85 I.C 900 : A.I.R 1925 M 950.

tory words and the circumstances attending their publication must also be taken into account (1). Thus where a libel is published in the course of public excitement and it is not easy to be precise in fixing the quantum of damages, aggravated damages are not allowed (2). In fact damages recoverable depend upon the nature and character of the libel, the extent of its circulation and the position in life of the parties (3). The method of publication of the libel has also to be considered in assessing damages. For instance, the fact that a libel is published in a newspaper is an important consideration in assessing damages (4). For a newspaper may fall into any hands and people are disposed to believe printed matters being generally of a permanent character, so that substantial damages may be awarded in case of a newspaper libel (5). A Civil Court may not give damages where the defendant has been convicted by the Criminal Court for the offence, in case the plaintiff has suffered no actual damage (6). The defendant in case of defamation should not be mulcted in damages for loss of repu-

Nature of the words and circumstances attending publication.

Extent of circulation and status of parties.

Method of publication.

Where defendant convicted for the offence by Criminal Court.

(1) 10 I. 816 : 117 I. C 884 : A. I. R 1929 I. 129.

(2) 15 Bom L. R 130 : 19 I. C 98.

(3) 24 M. L. J 8.

(4) 36 C 883 ; 13 C. W. N 895 : 6 M. L. T 73 : 3 I. C 224 (on appeal 37 C 760: 14 C. W. N 713 : 6 I. C 81).

(5) 37 P. L. R 670 : 159 I. C 854 : A. I. R 1935 L 328 (where a newspaper article most clearly injures the plaintiff's reputation, the plaintiff is entitled to substantial damages without proof of actual pecuniary loss)

(6) 25 W. R 22. See 5 L. W. 598.

Injury not due to libel

tation suffered by the plaintiff independently of the defamatory article (1).

Special damage in addition to general damage.

The plaintiff in addition to claiming general damages may also claim special damages for actual loss suffered. Losing the general good opinion of one's neighbour is not a special damage. There must be loss of some material advantage. Loss of caste is a loss of material advantage and the cost of the ceremonies necessary for expiation is a fair measure of damages (2).

(1) 55 C 1121 : 32 C. W. N 490 : 113 I. C 834 : A. I. R 1928 C 69 (on appeal from 54 C 73 : 101 I. C 565 : A. I. R 1927 C 207).

(2) 7 L. B. R 86 : 23 I. C. 3.

MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

CHAPTER I

PRELIMINARY.

Certain kinds of legal proceedings for which damages may be claimed.

It is an actionable wrong to institute certain kinds of legal proceedings against another person maliciously and without reasonable and probable cause, and the person so proceeded against is entitled to be compensated for the wrong done to his reputation or to his person or to his property as the case may be and may sue for damages (1). The chief classes of proceedings to which this rule of liability applies are the following—

(a) Malicious criminal proceedings.
(b) Malicious search,
(c) Malicious arrest.
(d) Malicious civil proceedings :
  (i) Malicious bankruptcy proceedings.
  (ii) Malicious liquidation proceedings.
  (iii) Malicious civil proceedings.

CHAPTER II

MALICIOUS CRIMINAL PROCEEDINGS.

No suit for damages for civil action.

A suit for damages will not lie for bringing an ordinary action however malicious, or however great the want of reasonable or probable cause may be, except where the

(1) 1914 A.L.W 171

proceedings involve either scandal to reputation, or possible loss of liberty to the person, or are specially provided for by the statute (1). Ordinarily, a civil suit, though false and malicious in its institution will not give rise to an action for damages, as the defendant is compensated by costs (2). The test to be applied is whether the suit complained of necessarily or naturally involves damages as would not be compensated by an order for costs. If the action necessarily and naturally involves such damage and was instituted falsely and maliciously, a suit for damages would lie (3). So where there is a malicious abuse of civil process, i.e., where there has been arrest of a person, or seizure of property in consequence of a civil action which is unfounded, vexatious and malicious, an action for damages may lie (4). So also in other proceedings which involve legal damage, such as when an application for bankruptcy, or for winding up of a going company is presented, a suit for a damages

Defendant compensated by costs.

Where damages not compensated by costs.

Malicious abuse of civil process.

Application for bankruptcy or winding up of a going concern.

(1) 42 C 550 : 18 C. W. N 1183 : 21 C. L. J 68 : 26 I. C 269, 31 M. L. J. 479 : 20 M. L. T 308 : (1916) 2 M. W. N 212 : 4 L. W 332 : 37 I. C 374.

(2) 12 R 289 : 148 I. C 895 : A. I R 1934 R 75, 112 P. R 1901, 162 P. R 1889, 31 C. L. J 495 : 57 I. C. 375 F. B (42 C 550 ibid, approved), 16 C. W. N 540 : 14 C. L J 515 : 11 I. C 729, 41 L C 522 (P), 1 B 467, 44 A 687 : 20 M. L. J. 636 : L. R. 3 A 408 : A. I. R 1922 A 465. See 46 C. L. J 455 : 106 I. C 277 ; A. I.R 1928 C 1, 6 W.R. Mis. 24. Sections 35 A and 95 (1) (b) of the Civil Procedure Code provide for further compensation in vexatious civil suits. Where a person is known to have financed an appellant, it will not give a cause of action to the respondents to recover damages from the financier personally because they have been unable to recover their costs from the appellant, 119 I. C 837 : A. I. R 1929 A 797.

(3) 12 R 289 ibid, 44 A 687 ibid.

(4) 16 C.W.N 540 : 14 C.L.J 515 : 11 I.C 729. See 'Malicious civil proceedings' post.

will lie (1). The foundation of an action for damages for malicious prosecution lies in the abuse of the process of the court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose (2). The word 'prosecution' in the title of the action is not used in the technical sense which it bears in criminal law (3). Ordinarily however as the expression 'malicious prosecution' implies, it is where a criminal prosecution has ended in acquittal that affords a cause of action for a suit for damages, and naturally the subject has developed along this line (4).

The foundation of an action for damages.

"Prosecution."

There are three kinds of damages, any one of which is sufficient to support an action for malicious prosecution, (a) damage to a man's fame, as where the matter with which he is associated is scandalous, (b) damage to his person, as where a man is put in danger of his life, limb or liberty, and (c) damage to his property, as where he is forced to spend money to defend himself against a charge of a crime of which he is accused (5). The term 'criminal charge' includes all indictments involving either scandal to reputation or the possible loss of liberty

'Three kinds of damages'.

"Criminal charge."

(1) See Chapter VI.

(2) 1947 M.W.N 337 : (1947) 2 M.L J 27 P.C.

(3) 1947 M.W.N 337 : (1947) 2 M.L.J. 27 P.C., ibid.

(4) A criminal prosecution under S. 211 Indian Penal Code (false charge) is not a condition precedent to a suit for damages, 3 M.

(5) 37 Bom. L.R 468 ; 158 I.C 31 : A.I.R 1935 B 355, 194 I.C. ; A.I.R 1941 C 13.

of a person. There are many regulations which the state has laid down for public convenience and of which the infraction is punished by a fine which therefore cannot give rise to an action for malicious prosecution on the ground of scandal to reputation. In any such case however if the prosecutor set the law in motion maliciously and without reasonable and probable cause, an action for malicious prosecution would lie where the plaintiff has been forced to expend money in neceseary charges to acquit himself of the crime of which he was accused (1). It is therefore no answer to the plaintiff's claim that the crime of which he is accused is punishable with fine only where he has been forced to expend money in acquitting himself of the charge, but not otherwise. A pleader was prosecuted by the municipal corporation for practising without licence inspite of his having paid the requisite licence fee. On production of the licence however he was discharged. In a suit for malicious prosecution brought by him it was held that there was no danger to life, limb or liberty of the plaintiff because the offence with which he was charged was punishable with fine only. Nor could the matter of which the plaintiff was accused be described as scandalous. Nor could the charges incurred by the plaintiff in engaging a pleader and paying him a fee be justified in

Where offence punishable with fine.

(1) I.L.R 1945 B 547 : 47 Bom. L.R 304 : A.I.R 1945 B 320.

as much as the plaintiff himself was a pleader and had a complete answer to the charge in the form of the licence granted by the corporation. Consequently the plaintiff had no cause of action (1).

CHAPTER III

THE ESSENTIALS

What plaintiff must show.

In a suit for damages for malicious prosecution the plaintiff must show, (a) that he was prosecuted by the defendant, (b) that the prosecution ended in his favour if from its nature it was capable of so terminating, (c) that there was no reasonable and probable cause for the prosecution, (d) that it was malicious, and (e) that damages have been caused as a result of the prosecution (2). The burden of proving every one of these is on the plaintiff (3). Acquittal in the criminal case does not dispense with the proof of malice and want of reasonable

Burden of proof on plaintiff.

(1) 194 I.C 374 : A.I.R 1941 C 13.
(2) 1947 M.W.N 337 : (1947) 2 M.L.J 27 P.C, I.L.R 1945 B 547 : 47 Bom

Read the first case in footnote (2), and wherever thereafter it recurs, as—

51 C. W. N 723 : 49 Bom L. R 584 : 1947 A. L. J 367 : 1947 A. W.R 54 : 1947 O. A 54 ; 1947 M. W. N 337 : (1947) 2 M. L. J 27 : 60 L. W 407 : 74 I. A 193.

and probable cause (1). The plaintiff has to prove both malice and want of reasonable and probable cause (2). In a suit for damages for malicious prosecution the plaintiff cannot succeed unless he can show either malice i. e, guilty knowledge or some wicked or indirect motive in the defendant, and also absence of reasonable and probable cause for the complaint (3). To support an action for malicious prosecution, there must be both malice in the defendant and a want of resonable and probable cause. Unless the plaintiff obtains a finding in his favour on each of the issues, the suit must fail. The two are distinct and proof of the one is not necessarily proof of the other (4). They must be proved independently of each other, though one may be be inferred from the other in the circumstances of a particular case. 'Malice' and 'want of reasonable and probable cause' have reference to the state of the defendant's mind at the date of the initiation of the

Both malice and want of reasonable and probable cause.

State of defendant's mind at initiation of prosecution.

(1) 10 P 842 supra, 56 M 641 supra. See 8 Mys L.J 174. See 'Acquittal' post.

(2) 26 M.L.T 214 : 1920 M.W.N 171 : 10 L.W 314 : 53 I.C 70, 3 Bur L. T 78 : 8 I. C 458, 6 L. L. J 1 : 72 I. C 411 : A. I R 1924 L 1, 12 C. L. J 410 : 6 I. C. 675, 6 Bur. L. T. 59 : 20 I. C 180, 36 M 375 : 24 M. L. J 515 : 19 I. C 665, 3 R 82 : 4 Bur. L. J 69 : A. I. R 1925 R 221, 92 I. C 512, 17 W. R 283 : 11 B. L. R. P. C 321, 1 C. W. N 537, 19 B 717, 13 M 394, 11 Q. B. D 448, 1937 O. L. R 121 : 1937 O. W. N. 226 : A. I. R 1937 O 251 : 167 I. C. 523, (1944) 1 M L J 40 : AIR 1944 P. C 1, 39 Mys H. C. R 162. See 49 L. W 664 : 1939 M. W. N 593 : (1939) 2 M L J 296 : 188 I. C 801 : AIR 1939 M 783.

(3) 39 Mys H. C. R 162.

(4) 10 R 282 ; 138 L C 693 : I. R 1932 R 161 : A. I. R 1932 R 80, 56 M 641 supra, 38 Bom L R 1098 supra. The plaintiff should be able to show that the complaint filed by the defendant was due to malice on his part, and was made without reasonable and probable cause, 30 P.L.R. J & K 16.

criminal proceedings and the onus rests on the plaintiff to prove them. The initial burden of proving the absence of reasonable and probable cause and the existence of malice rests upon the plaintiff and it may shift during the trial. The amount and nature of evidence required to discharge the initial burden depends on the facts of each case (1). See 'Reasonable and probable cause' and 'Malice' post,

Evidence required to discharge the burden.

That he was prosecuted.

In order to sustain an action for damages for malicious prosecution there must be a prosecution (2). There are two distinct views as to when a prosecution exists in law and when not. According to one view the prosecution commences when the prosecutor has taken the initial step of making his complaint to the Magistrate. The prosecution may fail at one or other of the various stages, but that cannot affect the time of commencement of the prosecution. Whether a process is issued or not is immaterial, what is material is the presence of malice animus in the act of the defendant; and the act may be merely the filing of the complaint (3). So according to this view a prosecution commences when a complaint is made, and it is not necessary in order to maintain an action for damages for malicious

Prosecution.

Two views.

One view: Prosecution starts with the complaint.

Issue of process immaterial.

(1) 1946 O. W. N 307 : 1946 O. A 238 : 1946 A. W. R 238 : 227 I. C 380.

(2) 1931 A. L. J 611 : A. I. R 1931 A 665.

(3) 2 Luck. 746 : 1 Luck. C 492 : 105 I. C 553 : A. I. R 1927 O 471. See 2 Luck 487 : 4 O. W. N 270 : 101 I. C 274, 51 Mys H. C. R 460.

Charge may not be acted upon by magistrate.

prosecution that the charge made should be acted upon by the magistrate or that process should be issued against the plaintiff on the complaint. If it is shown that the

Sufficient that defendant set the law in motion.

defendant clearly set the law in motion against the plaintiff on a criminal charge his act would amount to a prosecution and serve as the foundation for an action for damages (1). In short, according to this view, to prosecute is to set

How law is set in motion.

the law in motion and the law is only set in motion by an appeal to some person clothed in judicial authority in regard to

Gist of the view.

the matter in question. So the gist of the action for malicious prosecution is that the defendant set the magistrare in motion (2).

Illustrations.

Thus where a complaint of theft was dismissed under seceion 203 Criminal Procedure Code, a suit for damages was maintainable on the basis of the complaint itself (3), the point of commencement of a prosecution being independent of the result (4). Similarly, where a complaint was dismiseed for failure of the complainant to pay expenses of witnesses, there was a prosecution and a suit for damages was maintainable (5). A prosecution accordingly exists where a criminal charge is made before a judicial officer

(1) I.L.R 1942 Kar 45 : A.I.R 1942 S 141.

(2) I.L.R 1946 N 358 : 1946 N.L.J 113 : 221 I.C 666 : A.I.R 1946 N 46, I.L.R 1945 B 547 : 47 Bom. L.R 304 : A.I.R 1945 B 320.

(3) The same as (3), p. 179.

(4) 19 C. W. N 935 infra, 1930 A. L. J 885 ; A. I. R 1930 A 320. See 1944 A L W 64. See the other view, p. 184. See p. 186-7 for the true position.

(5) 42 A 305 : 18 A. L. J 204 : 58 I. C 542.

or a tribunal (1). "Prosecution" is not to be interpreted in its strictest sense as used in the Criminal Procedure Code (2) so that

itiation of pro-edings under ctions 107, 144 145 Cr. P. ode.

In fact too much stress must not be laid on the word 'prosecution'. It denotes an actionable wrong (2a).

(2a) 26 P 68

pplication for revision under S. 436 Cr. P. Code.

has a very wide significance, and an appli-cation in revision under S. 436 Criminal Procedure Code for ordering an inquiry or a retrial is a prosecution (5). There may not be the presentation of a complaint either. A man who pointed another as guilty of an offence to a police constable who arrested him but let him off after three days being found innocent, did a wrongful act for which he was liable in damages (6).

May not be a written complaint.

The defendant submitted a petition to a Sub-Divisional Magistrate alleging that there was a rumour current in his village that the plaintiff had hidden a treasure trove which had been discovered on a certain land and asking the Magistrate to inquire into the matter. The defendant subse-

Application under Treasure Trove Act.

(1) 19 C. W. N 935 : 20 C. L. J 518 : 27 I. C 449, 28 B 226 : 5 Bom. L. R 940, 3 U. B. R 88, 18 A. L. J 305, 4 Pat. L. W. 98, 7 Mys. L. J. 345.

(2) 19 C. W. N 935 ibid, 17 C. W. N 554 : 17 C. L. J 105 : 18 I. C 737, 34 PLR 931 : 146 I. C 291 : A. I. R 1933 L 735.

(3) 41 A 503 : 17 A. L. J 776 : 50 I. C 140, 43 A 402 : 19 A. L. J 191.

(4) 19 C. W. N 935 supra, 41 A 503 ibid, 100 I. C 449 : A. I. R 1927 A 412. See 13 M.L. J 370, 49 L.W 664 : 1939 M.W.N 593 : (1939) 2 M.L. J 296 : A. I. R 1939 M 783 : 188 I. C 801, contra.

(5) 1930 A. L. J 885 : A. I. R 1930 A 326 (17 C. W. N 554, 19 C. W. N 935, 49 C 1035, 41 A 503 relied on).

(6) 14 P. L. R 1916 : 1 P. R 1915 : 28 I. C 273. See 19 B 485 (wrongful execution of a warrant of arrest).

quently presented a petition to the Deputy Magistrate in which he accused the plaintiff and five others of having suppressed the finding of the treasure trove. Particulars of the finding and of the disposal of the articles found were given and the defendant also offered to produce evidence. The defendant also gave a sworn statement. As a result a charge was framed against the plaintiff under S. 20 of The Treasure Trove Act. The proceedings however resulted in the discharge of the plaintiff who thereupon brought a suit for damages for malicious prosecution. It was held that the petition filed by the defendant to the Deputy Magistrate was a complaint as defined by s. 4 Criminal Procedure Code, his intention being to induce the Magistrate to charge the plaintiff with an offence, and it had the desired effect and that consequently the defendant must be held to have instituted or caused criminal proceedings to be started against the plaintiff(1).

Proceedings under Legal Practitioners Act.

Proceedings of a quasi criminal nature do also give rise to a cause of action for malicious prosecution, if malicious and without reasonable and probable cause. Proceedings for public nuisance under section 133 Criminal Procedure Code are proceedings of a quasi criminal nature and so a suit for malicious prosecution would lie upon a malicious complaint of public nuisance (1a).

noted in the charge sheet in a criminal prosecution as an accused person not sent up for trial, and was in fact never so sent up, cannot be said to have been prosecuted and therefore has no cause of action to maintain an action for damages for malicious prosecution (1).

Accused not sent up.

According to the other view, the mere filing of a petition of complaint would not by itself be sufficient to maintain an action for damages against the complainant (2), for according to this view the prosecution really commences with the issue of process, summons or warrant after the complaint has been entertained by the Magistrate (3), and until process is issued, the person against whom a complaint is made is not an accused person, nor can he be said to be prosecuted. Where therefore, on a com-

Other view: Prosecution commences on issue of process.

Illustrations.

Put mark (4), after the word 'prosecution' and add footnote—

(4) 1940 N. L. J 237 : 190 I. C 755 : A. I. R 1940 N 225, 13 R 764.

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misses the complaint under s. 203 Criminal

690 : 170 I.C 615 : A.I.R 1937 A 506 (the proceedings though not criminal are akin to criminal proceedings and certainly come within the class of civil proceedings which cause damage the moment they are launched).

(1) 48 C. W. N 258 : 1944 A. L. J 137 : 1944 A. W. R 11 : 47 Bom L. R 566 : (1944) 1 M.L.J 40 : 1944 M. W. N 182 : 57 L.W 81 : 24 Pat L.T 395 : 1944 P. W. N 1 : 10 Cut L. T 1 : 10 B. R 413 : I. L. R 1944 Kar 47 : 1944 O. A 11 : 211 I. C 141 : A. I. R 1944 P.C. 1.

(2) 41 I.C 12. See 1 N.W 71 (Part II of 1873).

(3) 47 M 181 : 25 M.L.J 1 : 29 I.C 703, 12 P 292 : 14 Pat L.T 588 : 145 I.C 271 : A.I.R 1933 P 292.

Procedure Code, there is no 'prosecution' of the plaintiff, and a suit by the latter for damages for malicious prosecution against the defendant does not lie (1). Similarly, where the Magistrate on receiving a complaint held a preliminary enquiry after notifying the person accused and in his presence and then dismissed the complaint under section 203 Criminal Procedure Code, there was no prosecution and no cause of action for a suit for damages (2). That is to say, where a complaint is dismissed under section 203 Criminal Procedure Code, the proceedings have not reached the stage of prosecution and no action lies for damages (3). So a person against whom a complaint is preferred, but the same is summarily dismissed without summons being issued against him is not an accused person and a suit by him against the complainant for damages will not lie (4). So where a petition against the plaintiff under section 107 of the Criminal Procedure Code was dismissed without any notice being issued to the plaintiff, there was no prose-

Complaint dismissed under S. 203 Cr. P. C.

Petition under S. 107 Cr. P. C.

(1) 13 R 764.

(2) 47 M 181 supra, 49 C.W.N 282, 1926 M.W.N 527 : 24 L W 22 : 97 I.C 351, 1931 A.L.J 611 : A.I.R 1931 A 665.

(3) 49 C.W.N 282, 8 P 284 : 10 Pat. L T 415 : 118 I.C 133 : A.I.R 1929 Pat 271. According to a recent Allahabad case where, though the complaint against the plaintiff is dismissed under S. 203 Cr. P. C., summons was in fact issued and the plaintiff appeared through pleader a suit for damages for malicious prosecution would lie, 1944 A.L. W 64. See the other view, p. 180. See page 186-7 for the true position.

(4) 38 C 880 : 15 C.W.N 917 : 11 I.C 311, 1 P.R 1215, 138 I.C 282 : I.R 1932 A 385 : A.I.R 1932 A 386, 53 L.W 238 : 1941 M.W.N 226 : (1941) 1 M.L. J 200 : 198 I.C 338 : A.I.R 1941 M 538, 1940 N.L J 237 : 190 I.C 755 : A.I.R 1940 N 225.

cufion amd no suit lay (1), although there had been a police enquiry ordered by the Magistrate (2). Similarly, where the Magistrate to whom a complaint was made, sent the case for enquiry to the police and the atter at the request of the complainant, lropped the enquiry and there was no process issued by the Magistrate, there was no cause of action for a suit for damages (3).

Complaint dropped at police enquiry.

So, according to this view unless a process s issued and the accused is brought into Court as a result of such process, he has no ause of action for a suit for damages for nalicious prosecution (4). Where there vas nothing in the complaint, but being xamined the complainant mentioned the plaintiff's name whom the Magistrate summoned of his own accord but ultimately he vas acquitted, there was no prosecution of he plaintiff by the complainant (5). So lso where after a theft in his house the efendant informed the police, gave particulars of the stolen articles and also stated hat he suspected the plaintiff, and the olice arrested the plaintiff, kept him in ajat and eventually not finding any evience connecting him with the theft submitted a final report on which he was dis-

Nothing in complaint, but mentioned by defendant in examination.

Report of theft to Police.

(1) 49 M 315 : 50 M.L.J 460 : 24 L.W 327 : 93 I.C 8 : A.I.R 1926 M 1.
(2) 7 I.C 255.
(3) 37 C 358 : 6 I.C 877.
(4) 12 P 292 : 14 Pat L.T 588 : 145 I.C 271 : A.I.R. 1933 P 292.
(5) 24 A 317. See 138 I.C 282 supra.

charged by the Magistrate, there was no prosecution(1). Where however no process was actually issued or served but an order for issue of process under s. 204 Criminal Procedure Code and of a search warrant was formally recorded and the accused appeard after the passing of the order, it was held that the prosecution had technically commenced and the plaintiff had a cause of action (2).

Accused appearing after order but before issue of process.

The true position has now been indicated by the Privy Council, namely, to found an action for damages for malicious prosecution based upon criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution : the test is whether such proceedings have reached a stage at which damage to the plaintiff results. It is not necessary to go so far as to say that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution (3). Where a Magistrate had taken cognisance of a complaint of cheating under section 420, Indian Penal Code, examined the complainant on oath, held an enquiry in open court under section 202, Criminal

The **true position.**

(1) 57 C 25 : 125 I.C 667 : I.R 1930 C 587 : A.I.R 1930 C 392.

(2) 12 P 292 : 14 Pat L.T 598 : 145 I.C 271 : A.I.R 1933 P 292 (although the magistrate subsequently modified the process into one under S. 202 Cr. P. C).

(3) 1947 M.W.N 337 : (1947) 2 M.L.J 27 P.C.

Procedure Code, which the accused attended and at which he incurred costs in defending himself and thereafter dismissed it under section 203 Criminal Procedure Code, an action for damages will be well founded and the plaintiff will be entitled to judgment, when it is found at the trial that there was no reasonable and probable cause for the criminal proceedings and that the defendants were actuated by malice (1).

Prosecution includes application for sanction to prosecute.

Prosecution, next, is not confined to a proceeding before a Magistrate or a Criminal Court. If a judicial tribunal is moved which has the power to take criminal action against the person charged, the requirements of law is satisfied and a claim for damages for malicious prosecution will arise. 'Prosecution' thus includes an application to a Civil Court for sanction to prosecute (2). Such an application for sanction to prosecute is an initial stage in a criminal prosecution and so can be the basis of a suit for damages (3), even though it is not in fact followed by a complaint or prosecution by the Court (4), but is ultimately dismissed (5).

Even though dismissed.

(1) 1947 M.W.N 337 : (1947) 2 M.L.J 27 P.C ibid.

(2) 56 C 432 : 33 C.W.N 79 : 48 C L.J 339 : 114 I.C 796 : A.I.R 1928 C 691, 60 C 1022 : A.I.R 1933 C 909.

(3) 49 C 1035 : 27 C.W.N 387 : 67 I.C 705 : A.I.R 1922 C 145, 34 P.L.R 931 : 146 I.C 291 : A.I.R 1933 L 735. But see 9 A 69.

(4) 34 P.L.R 931 : 146 I.C 291 : A.I.R 1933 L 735 (application to executing Court for sanction to prosecute the judgment-debtor's brother for resistance to execution of the decree against the judgment-debtor).

(5) 49 Mys H.C.R 463.

Illustration.

Where as a result of an application by a person to prosecute another under s. 211, Indian Penal Code, an enquiry was held by a Magistrate under s. 476, Criminal Procedure Code in respect of which notice was issued to that other person and he did appear before the Magistrate and the Magistrate ultimately refused to make a criminal complaint, the proceedings amounted to a prosecution for which a suit for damages for malicious prosecution lay (1). For though the application is ultimately dismissed, there is a prosecution, and the person against whom the application is filed and who incurs expenditure and trouble in showing cause and procures the dismissal of the applicaiion, is entitled to institute a suit for damages for malicious prosecution (2). If the application is allowed and an order is made directing prosecution but the order is set aside on appeal and the party is discharged there is virtually an acquittal and a suit for damages for malicious prosecution will lie (3).

Application allowed, but dismissed on appeal.

When facts alleged do not constitute offence.

A party is not liable when the facts alleged do not constitute an offence under the particular section of the Penal Code alleged by him in his complaint (4).

(1) I.L.R 1939 A 424 : 1939 A.L.J 367 : 1939 A.W.R 299 : 184 I.C 247 : A.I R 1939 A 554.

(2) 49 Mys H.C.R 463.

(3) 60 C 1022 : A.I.R 1933 C 909.

(4) 18 I.C 925, 27 C 532.

Application suggesting prosecution for contempt of Court.

An application by the defendant suggesting a prosecution of the plaintiff for contempt of court was dismssed by the Magistrate after hearing the plaintiff who appeared in response to the notice served on him. The plaintiff sued the defendant for damages for malicious prosecution. It was doubtful whether it could be said in the circumstances of the case that the defendant did institute a prosecution in any sense of the term against the plaintiff, but even if the defendant be taken to have instituted a prosecution it could not be said that the defendant was not in good faith when he made the suggestion which he did make, as the facts stated by him were perfectly true and if he, without a proper consideration of the legal aspect of the matter suggested proceedings against the plaintiff which could not properly be taken, that in itself is not a sufficient ground for passing a decree in the suit (1).

By the Defendant.

Actual prosecution by defendant not necessary,

It is not necessary that the defendant should have actually prosecuted the plaintiff, if he gives information to the authorities which naturally leads to prosecution he is liable (2). Any person who makes a

(1) 1935 A.W.R 961 : 159 I.C 723 : A.I.R 1935 A 1011.

(2) 30 C.W.N 866 P.C, 5 O.W.N 1039 : 114 I.C 501.

Sufficient if instrumental in the making of the prosecution.

criminal charge, or is actively instrumental in the making of such a charge is a prosecutor (1). So that in a suit for malicious prosecution, the plaintiff need not prove that the defendant in the case was in fact the actual prosecutor in the proceedings before the Criminal Court. Where the prosecution of the plaintiff before the Criminal Court was substantially the work of the defendant he is liable (2). A suit for damages is consequently maintainable against the person who supplied the information on which the prosecution was launched, though he may not himself figure as a complainant in the Criminal Court (3). Thus where a person accused of an offence makes a confession incriminating another as a co-accused, as a result of which proceedings are taken against the latter, he is liable in an action for malicious prosecution (4). A person can be said to have prosecuted if information is given to the police directed against a person who is ultimately prosecuted as a result of the investigation and the report of the police (5). A suit for damages similarly lies against a

If prosecution substantially the work of the defendant.

May not himself figure as complainant.

Incriminating in confession another as co-accused.

Information to police.

(1) 19 C.W.N 985 : 20 C.L.J 518: 27 I.C 449. It is no excuse that the defendant instituted the prosecution under the order of a Court, if the order was the outcome of the defendant's false evidence, 29 B 368 : 7 Bom. L.R 20.

(2) 27 I.C 410.

(3) 12 L. W. 170; 59 I. C. 973 (26 M 362 dissented from), 36 C 278 : 12 C. W. N 817 : 1 I.C 970, 42 M 880 : 37 M.L.J 234 : 26 M.L.T 140 : 1919 M.W. N 577 : 10 L.W 235 : 52 I.C 782.

(4) 10 O.L.J 468 : 79 I.C 697 : A.I.R 1924 O 145.

(5) A.I.R 1934 Pat 14 (30 A 525 P.C., A.I.R 1926 P.C 46 referred to).

person even though he only made a report to the Village Munsif in Madras, as a result of which the police launched the prosecution, if the other essentials necessary for an action for malicious prosecution are present (1). A person is responsible for the result which is the inevitable consequence of his act (2). So also a suit lies if the defendant causes, or procures a prosecution through a third person, whether the latter is an officer of law or not (3). But where a person has been tried by a Criminal Court on its own motion, or by mistake, or by inadvertence, and not at the instance of the complainant, the former on his acquittal cannot maintain any action against the complainant for damages for malicious prosecution (4).

Report to village Munsif.

Procuring prosecution through a third person.

Prosecution by Court on its own motion.

The mere fact of setting the law in motion however is not the test to find out who the prosecutor really is (5). Indeed, the liability of the defendant to an action for malicious prosecution does not depend on his first having set the law in motion. Whether the defendant was in fact the prosecutor or not depends on the facts and circumstances disclosed in evidence (6). If

Mere setting of the law in motion not the test.

Depends on facts and circumstances disclosed in evidence.

(1) 42 M 880 supra.

(2) 4 Pat. L.W 98 : (1917) Pat. 383 : 40 I.C 679.

(3) 29 M.L.J 694 : 18 M.L.T 500 : 1915 M.W.N 911 : 31 I.C 246.

(4) 138 I.C 282 : I.R 1932 A 385 : A.I.R 1932 A 386.

(5) 6 A.L.J 500 : 2 I.C 355, 82 I.C 1014 : A.I.R 1925 N 216, 46 A 815 : 22 A.L.J 761 : L.R 5 A 536 : 80 I.C 874 : A.I.R 1924 A 845, 19 Pat. L.T 889 : A.I.R 1938 P 529, 30 S.L.R 431 : 168 I.C 643 : A.I.R 1937 S 44.

(6) 10 R 283 : 138 I.C 693 : I.R 1932 R 161 : A.I.R 1932 R 80.

the complainant has not done anything beyond giving what he believed to be correct information to the police and if without further interference on his part the police thinks fit to prosecute, he will not be liable if the prosecution fails. It is his duty as a citizen to state to the authorities what he knows and honestly believes respecting the commission of a crime and for the sake of public justice such charges and communications which would otherwise be slanderous are protected if bona fide (1). Where a burglary was committed in the house of the defendant, it was his duty to inform the police, and if the police arrested the plaintiff and found a great number of articles by searching his house which the defendant identified as his articles that were stolen, the defendant cannot be said to have prosecuted the plaintiff, or to have taken part in the conduct of the prosecution so as to render him liable for damages for malicious prosecution and it is immaterial that he was examined as a witness for the prosecution (2).

Where one merely does his citizen's duty regarding commission of a crime.

Illustration.

The fact that a private person makes a statement to the police charging another with

(1) 9 O & A.L.R 302 ; A.I.R 1923 O 247, 164 I.C 1074 : A.I.R 1936 S. 133, 26 M 362, 117 I.C 62 : A.I.R 1929 R 63 (even if some one had told him that the man was innocent, and although he engaged counsel), 57 C 25 : A.I.R 1930 C 392, 82 I.C 1014 supra, 187 I.C 689; 1940 A.L.J 231 : 1940 A.W.R 204 : 188 I.C 211 ; A.I.R 1940 A 231, 1943 M.L.R 53. A person filing a true complaint against a process-server who is ultimately acquitted is not liable, 6 A.L.J 500 supra.

(2) 28 M.L.T 298 : 12 L.W 87 : 59 I.C 218. See 9 O & A.L.R 302 ibid. See A.I.R 1937 S 44 infra.

urder would not make him a prosecutor so as to sustain an action against him for malicious prosecution. In India prosecution for murder is by and in the name of the Crown. A private person who merely makes a statement or complaint setting out the information which he believes to be correct, would not make him the prosecutor. To become the prosecutor, he must be actively instrumental in putting the criminal law in motion. Where there is evidence to show that the police made an independent investigation as a result of which they charged not only the persons named by the private individual but others also, and the conduct of the private individua before and after he made the statement or complaint does not indicate that he was the person who instigated the prosecution, it cannot be said that his information led to the prosecution so as to entitle the person charged to maintain an action for malicious prosecution against the informant (1). Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime, or the security of public morals are privileged, provided the subject matter is within the competence of the person addressed (2). If the information is false and unfounded, malice is presumed and the privilege is destroy-

Unless actively instrumental in putting the criminal law in motion.

(1) 23 Mys L. J 166 : 50 Mys H. C. R. 64.
(2) 22 A. L. J 65 : L. R 5 A 95 : 79 I. C 640 : A. I. R 1924 A 445.

If information false and unfounded.

ed (1). If the complaint was false to his knowledge and if he misled the police by bringing suborned witnesses aud if the police were influenced by him to send up an innocent man for trial, he will be liable for damages though not technically conducting the case himself (2). The conduct of the complainant before and after making the charge must be taken into account (3).

Conduct before and after making the charge.

Illustrations

For example where it is found that the defendant supplied false information to the police, fabricated false evidence and employed a vakil, the defendant is the real prosecutor liable for the damages and not the police (4). Theoretically all prosecutions are conducted in the name of the Crown, but in practice this duty is often left in the hands of the persons immediately aggrieved by the offence, so that although the prosecution is not actually launched by the defendant, if it is found that he engaged vakils to instruct the public prosecutor and to cross-examine the defence witnesses and when the Magistrate dismissed the case, he applied to the District Magistrate for revision and for further enquiry and it is found

(1) 22 A.L.J 65 : L.R 5 A 95 : 79 I.C 640 : A.I.R 1924 A 445.

(2) 82 I. C 1014 : A.I.R 1925 N 216, 164 I. C 1074 : A.I.R 1936 S 133, 30 S.L.R 431 : 168 I. C 643 : A.I.R 1937 S 44. See 60 C 955 : A.I.R 1933 C 708

(3) 6 A.L.J 500 : 2 I.C 355, A.I.R 1937 S 44 ibid

(4) 36 C 278 : 12 C. W. N 817 : 1 I. C 970, 30 A 525 : 5 A. L. J 665 : 12 C.W.N 1017 : 8 C.L.J 337 : 10 Bom. L.R 1080 : 18 M.L.J 394 : 4 M.L.T 204 : 35 I.A 189 P.C., 24 A 317, 30 S.L.R 431 : 168 I.C. 643 : A.I.R 1937 S 44 (defendant instigated the prosecution. There is a great difference between instigating a prosecution and merely giving information upon which a prosecution is started by someone else in the exercise of his own discretion).

that he was actuated by malice, he for all practical purposes was the prosecutor and is liable in damages (1). So the answer to the question who is the prosecutor must depend upon the whole circumstances of the case. Where the defendant made a report to a Sub-Inspector of Police against the plaintiff and on his not taking any action moved the Superintendent of Police to direct the Sub-Inspector of Police to make an investigation and prosecute the plaintiff and eventually a challan was filed against the plaintiff under s. 454 Indian Penal Code, there the defendant was the prosecutor (2). A prosecution again might have been commenced under a bonafide belief in the guilt of the accused, or it might have been undertaken at the instance of a Judge, or a Magistrate, but it may subsequently become malicious if one having known subsequently of the innocence of the accused, persists malafide in the prosecution in order to procure his conviction (3).

Prosecutor determined by whole circumstances of the case.

Prosecution started bonafide, may subsequently become malicious.

The name of the defendant thus need not appear as a prosecutor. A person initiating a prosecution but keeping himself in the back ground and appearing as a witness in the box (4), or leaving it to the police

Prosecutor keeping himself in the background.

(1) 46 A 815 supra, 30 A 525 supra. See 29 M. L. J 694 : 1915 M.W. N 911, 1909 A.L. J 516, 4 Pat L. T 202., 164 I. C 1074 : A.I.R 1936 S 133, 20 N. L. J 261

(2) I.L.R 1946 N 358 : 1946 N.L.J 113 : 221 I.C 666 : A.I.R 1946 N 46.

(3) 82 I. C 1014 supra, 8 O. L. J 147: 61 I. C 970, 33 C. W. N. 79 : 48 C. L. J 339 : A. I. R 1928 C 691, 12 C. L. J 410, 30 B 37 : 7 Bom. L. R 665, 10 R 282 : 138 I.C 693 : A.I.R 1932 R 80. 151 I.C 636.

(4) I. L. R 1940 Kar 290 : 189 I.C 72 : A. I. R 1940 S 90.

to have the formal conduct of the case or assuming conduct of the case after it is initiated by the police, shall be deemed to be a prosecutor for the purpose of malicious prosecution (1). A plaintiff thus, besides the other elements, has to prove affirmatively that the defendant was either, (a) the actual prosecutor, or (b) gave information leading to a false charge and consequent prosecution (2). Merely writing a letter to the C.I.D who had already begun investigation against the plaintiff thus, is not prosecution, though the C.I.D might have discovered other evidence in consequence of the letter (3). In the absence of evidence to show that the statements made by the defendant before the police were directly and primarily responsible for the prosecution of the plaintiff, an action for malicious prosecution must fail (4).

'hat plaintiff ast prove.

o vicarious ability.

In an action for malicious prosecution, a defendant who is sued as having instituted the prosecution himself and therefore primarily liable for damages, cannot, where it is shown that he is not liable because he did not act with malice, or without reasonable or probable cause, be held liable on account of any special knowledge of his servant who took part in the prosecution

(1) 8 M. L. T 242 : 8 I. C 315.
(2) 1 Pat. L. T 422: 57 I. C 392. See 22 L.W 87, 28 M.L.T 298.
(3) 1 Pat. L. T 422 ibid,
(4) 19 Pat L.T 398 : 174 I. C 388 : A. I. P 1938 P 147.

and who withheld knowledge from his master, provided the master took all reasonable precautions in the matter. A person cannot be sued both as personally and vicariously liable as being the master or employer of the servent who was primarily liable. It is not in the ordinary course of a servant's or an agent's employment to institute a criminal prosecution, and in a case for damages for malicious prosecution, which is a special class of case and in which malice and want of reasonable or probable cause have to be proved, the principle that a master is not liable for his servant's torts committed outside the usual scope of the servant's employment, should be strictly applied, and if the servent maliciously institutes a prosecution without his master's authority, or when his master has instituted a prosecution withholds information from him that he should have given, the master cannot be liable (1).

Person who set the law in motion and collaborators liable.

An action for malicious prosecution can be maintained not only against the individual who set the law in motion against the plaintiff, but also against every other person whose conduct with reference to the charge or trial points him out as one responsible for the prosecution. That a particular person figured as a witness in the criminal case is not the criterion, but

(1) A. I. R 1933 N 299 [48 A 560, (1912) A. C 716, (1878-79) 4 A. C 270 relied on]. See 27 S.L.R 41 : 144 I.C 452 : A.I.R 1933 S 176.

may be an element to be considered. So the defendants who had, by creating false evidence against the plaintiff before the charge and by giving false evidence during the trial in support of the charge, attempted to secure a conviction of the plaintiff, are liable in damages in an action for malicious prosecution (1). But where there was no reliable evidence to prove that the several defendants had given evidence in pursuance of a conspiracy to obtain the conviction of the plaintiff who later on sued for damages for malicious prosecution, damagas should not be awarded against such of those who had merely given false evidence but had not been complainants (2). According to the Punjab High Court no civil action lies against a witness for giving false evidence, though the evidence is given as a result of a conspiracy to obtain the conviction of the accused person (3).

'itness not liable conspiracy not roved,

unjab High ourt's view,

An action for damages for malicious prosecution lies for a prosecution under the Cattle Trespass Act (4).

rosecution

respass Act,

Proceedings under the Disorderly Houses Act cannot be said to be a prosecution and a suit for damages in respect of such proceedings is not a suit for malicious prosecution governed by article 23 of the

'nder Disorderly ouses Act.

(1) 62 M. L. J 107 : 34 L. W 898 : 135 I. C 619 ; I. R 1932 M 187 : A. I. R 1932 M 53 (30 A 525 P.C., 30 C.W.N 866 P. C followed).

(2) 9 O. W. N. 1067.

(3) 32 P. R 1917 : 66 P. L. R 1917 : 47 P. W. R 1917 : 38 I. C 678. He may be prosecuted for perjury.

(4) 20 M. L. T 308.

Limitation Act, but is one for compensation for libel, governed by article 24 of the Limitation Act (1).

That the prosecution ended in his favour.

No action before termination of proceedings.

No action for malicious prosecution or any other malicious proceeding which involves a judicial decision of any question at issue between the parties will lie, until or unless the prosecution or other proceeding has terminated in favour of the person complaining of it. So long as the proceedings are pending no action lies on the ground that they have been wrongfully instituted. It must appear that they were brought to a legal end even though the end might not be a final and conclusive one. It would be enough if the prosecution has been discontinued or if the accused person has been acquitted by reason of some formal defect in the indictment or if a conviction has been quashed for some technical defect in the proceedings (2). Formerly in an action for malicious prosecution the plaintiff had to prove that his innocence was pronounced by the Court before which the accusation had been made, for it was argued that a man was not to be mulcted in damages merely because he failed to prove another's guilt, nor is a man to receive compensation merely because there is a

Old law.

(1) 18 C. L. J 352 : 20 I.C 768.
(2) I.L.R 1945 B 547 : 47 Bom L.R 304 : A.I.R 1945 B 320.

reasonable doubt about his guilt (1), and the plaintiff had also to prove that he was innocent of the charge that had been brought against him (2). The Madras High Court subsequently put it in this way, namely, that the plaintiff was not bound to prove his innocence affirmatively but that it would suffice that the prosecution ended favourably to the accused (3), and the entire outlook has now been changed by the Privy Council laying it down that in a suit for damages for malicious prosecution the plaintiff has to prove only that the criminal proceedings terminated in his favour if from their nature they were capable of so terminating and it is not necessary to prove that he was innocent of the charge upon which he was tried (4). It is thus no longer necessary for the plaintiff to establish his innocence (5), it suffices if he shows as the Privy Council has laid down he need show, namely, that the proceedings terminated in his favour, if by their nature they were

Entire out-look now changed.

The present law.

(1) 9 Bur. L.T 48 : 31 I.C 324, 8 Bur. L.T 69 : 8 L. B.R 78 : 29 I.C 883, 44 A 485 : 20 A.L.J 284 : L.R 3 A 199 : 67 I.C 65 : A.I.R 1922 A 209, 2 U. P.L.R 127 : 56 I.C 161, 18 I.C 830.

(2) 28 Bom. L.R 459 : 95 I.C 39 : A.I.R 1926 B 306, 18 I. C 830, 8 Bur. L.T 69 ibid, 9 Bur. L. T 48 ibid, 17 C.W.N 434 : 19 I. C 24, 32 P.R 1919 : 77 P.L.R 1919 : 51 I.C 279, 85 I.C 470 : A.I.R 1925 Pat. 469, 10 O.L.J 468 : 79 I.C 697 : A.I.R 1924 O 145, 41 A 485 supra. See also 15 C.W.N 646 : 11 I.C 580, 38 C 559 : 15 C.W.N 593 : 10 I.C 582, 28 C 591 : 6 C.W.N 159, 6 C.W.N 298, 17 C.W. N 434, 24 M 59, 17 W.R 283 P.C.

(3) 34 M.L.J 517 : 23 M.L.T 341 : 1918 M.W.N 454 : 7 L.W 604 : 45 I.C. 803.

(4) 30 C.W.N 866 : 43 C.L.J 521 : 28 Bom. L. R 921 : 24 A.L. J 453 : 51 M L. J 42 : 1926 M.W.N 482 : 7 Pat. L.T 591 : 3 O.W.N 499 : 13 O.L.J 749 : 1 Luck 215 : 95 I.C 329 : A.I.R 1926 P.C 46, 19 Pat. L.T 889 : A.I. R 1938 P 529.

(5) I.L.R 1940 Kar 230 : 189 I.C 72 : A.I.R 1940 S 90.

apable of so terminating (1). See p. 177. And the judgment of the Criminal Court conclusive for the purpose of showing hat the prosecution terminated in favour f the plaintiff (2). It is not open to the efendant to question the correctness of he plaintiff's acquittal (3). If the laintiff shows that the Magistrate passed n order in his favour under S. 203 Crimi- al Procedure Code and the defendant ails to show that the proceedings were evived, then the plaintiff has shown ll that is necessary for the suit (4). So he plaintiff can establish the other acts necessary to entitle him to damages vithout proving his innocence, but if e relies on the falsity of the complaint to stablish those other facts, he must prove is innocence by proving the complaint to e false and he cannot do this by simply utting in the judgment of the Criminal Court which acquitted him (5).

Criminal Court's judgment conclusive.

Not to be questioned.

Where only innocence to be proved.

(1) 9 L.W.N 41 : 29 Punj. L.R 366 : 108 I.C 397, 117 I.C 368, 50 A 713 : A.L.J 439 : 110 I.C 413 : A.I.R. 1928 A 337, 136 I.C 757 : I.R 1932 S 53 : I.R 1932 S 23 (11 B.L.R 321 P.C followed), 1931 A.L.J 611 : A.I.R 1931 665, 10 P 842 : 135 I.C. 526 : I.R 1932 P 46 : A.I.R 1932 P 91. See 6 B 6, 20 W.R 177, A.I.R 1929 A 878, 8 Mys. L J 174. But see 116 I.C 852 : A. R 1929 A 295 (the Privy Council case does not appear to have been laced before the Judges who decided the case).

(2) I.L.R 1945 B 547 : 47 Bom. L.R 304 : A.I.R 1945 B 320, 50 A 713 id, 8 Mys. L.J 174. See 60 P.R 1902; 1 C.W.N 537.

(3) 194 I.C 374 : A.I.R 1941 C 13.

(4) 1931 A.L.J 611 : A.I.R 1931 A 665.

(5) A.I.R 1929 N 260 (A.I.R 1922 A 209 relied on), A.I.R 1929 A 878 he onus shifts on the defendant to prove that the charge disbelieved y the Criminal Court was true).

That there was no reasonable and probable cause.

Absence of reasonable and probable cause to be shown.

Besides the fact of the prosecution and of its termination in favour of the plaintiff, it has to be shown that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious intention (1). The general principle of the common law is that an action for malicious prosecution lies whenever one puts the process of law in motion against another, maliciously and without reasonable and probable cause. 'On the determination of the ancillary facts which may afford an answer to the prosecution, will depend the answer to the question as to whether there was or was not reasonable and probable cause for the prosecution (2). Thus in an action for malicious prosecution if the defendant had no honest impression or belief but brought criminal proceedings against the plaintiff without taking care to ascertain the real facts, it will go to show that he was actuated by malice and had no reasonable and probable cause for instituting the proceedings (3). So in deciding whether there was absence of reasonable and probable cause for the prosecution the court can only have regard to the facts known at the time of the presentation of the complaint (4).

Absence how proved.

(1) 56 M 641 : 65 M.L.J 146 : 1933 M.W.N 1301 : 37 L.W 623 : 143 I. C 825 : A.I.R 1933 M 429.

(2) 2 Luck 487 : 4 O.W.N 270 : 101 I.C 274 : A.I.R 1928 O 145.

(3) 60 C 918 : 38 C.W.N 120 : A.I.R 1933 C 706.

(4) 51 LW 635 : 1940 MWN 305 : (1940) 1 M.L.J 668 : A.I.R 1940 M 683.

Reasonable and probable cause means a ıuine belief based on reasonable grounds ıt the proceedings are justified. The ›secutor must have believed on reasonable ›unds that the probability of the guilt of : accused was sufficient to render a prose- :ion reasonable and justifiable. The ques- ı does not depend on the actual existence : upon a reasonable and bonafide belief in : existence of such facts as would justify a ›secution (1), i.e. reasonable and probable :se must be such as would operate on the nd of a discreet and reasonable man (2). reasonable and probable cause may be .ned as an honest belief in the guilt of the used, based upon a full conviction found- upon reasonable grounds of the existence ı state of circumstances which, assuming m to be true, would ordinarily lead any linary, prudent and conscientious man, ced in the position of the complainant, to : conclusion that the person charged was bably guilty of the crime imputed (3). :s is the guiding rule,—it precribes not a

Reasonable and probable cause explained.

Defined.

) I.L.R 1945 B 547 : 47 Bom L.R 304 : A.I.R 1945 B 320.

) 32 S.L.R 1 : 173 I.C 407 : A.I.R 1938 S 11.

) (1878) 8 Q.B.D 167 at 171 Per Hawkins J., (1938) A.C 305 : 107 L.J 225, 161 I.C 617 : A.I.R 1935 R 7, 39 Bom. L.R 1098 : A.I.R 1937 B) I.C 925, I.L.R 1916 N 358 : 1916 N.L.J 113 : 221 I.C 666 : A.I.R 1946 6 Bur. L.T 59: 20 I.C 180, 9 Bur L.R 153, 28 Bom L.R 459 : 95 I. A.I.R 1926 B 306, 26 M L.T 214 : 1920 M.W.N 171 : 10 L.W 314 : : 70, 34 M.L.J 517 : 23 M.L.T 341 : 1918 M.W.N 454 : 7 L.W 604 : 43 3, 6 L.L.J 1 : 72 I.C 411 : A.I.R 1924 L 1, 89 I.C 432 : A.I.R 1926 N 7 C 25 : A.I.R 1930 C 392, 24 A 363, 10 R 282 : 138 I.C 693 : I.R 1932 : A I.R 1932 R 80, 12 C.L.J 410. See Bourke O.C 18, 3 M.H.C.R 372 :e and absence of reasonable and probable cause need not be ssly pleaded). See 28 B 226 : 5 Bom. L.R 910 (mere suspicion is fficient), also 39 Mys H.C.R 162.

State of defendant's mind the pivot.

standard of absolute rectitude and certainty but of reasonableness and probability in relation to the defendant's mind(1). So that the pivot upon which all actions for malicious prosecution turn, is the state of the mind of the prosecutor at the time he initiates or authorises the prosecution (2). In fact 'malice' and 'want of reasonable and probable cause' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings and the onus rests on the plaintiff to prove them (3). The plaintiff cannot succeed unless he can show either guilty knowledge, or some wicked or indirect motive in the defendant (4).

Onus on plaintiff

When defendant acts on information given by another.

If he receives information from others and acts upon it by making a criminal charge against a person, the motives of the informant and the truth in fact of the story he tells are to a greet extent beside the point. The crucial points for consideration would be, (a) did the prosecutor believe the story upon which he acted, (b) was his conduct in believing and acting on it that of a reasonable man of ordinary prudence, and (c) had he any indirect motive

The crucial points.

(1) 8 O.L.J 147 : 61 I.C 970.

(2) 49 I.C 232, 1946 O.W.N 307 : 1946 O.A 238 : 1946 A.W.R 238 : 227 I.C 328, 2 Luck 487 : 4 O.W N 270, 28 Bom. L.R 459 supra, 14 C.W.N 86 : (1909) A C 549 : 5 I.C 50 P.C., 101 I.C 274 : A.I.R 1928 O 145, 6 M.H. C.R 85, 4 A.W.N 1, 24 A 363 (367), 1937 O.W.N 226 : 1937 O.L.R 121 : 167 I.C 523 : A.I.R 1937 O 251, 194 I.C 374 : A.I.R 1941 C 13, 15 Luck 404 : 1940 O.W.N 201 : 186 I.C 293 : A.I.R 1940 O 320. See 49 L.W 664 : 1939 M.W.N 593 : (1939) 2 M.L.J 296 : 188 I.C 801 : A.I.R 1939 M 783.

(3) 1946 A.W.R 238 : 1946 O.W.N 307 : 1946 O.A 238 : 227 I.C 380.

(4) 12 Mys L.J 115, A.I.R 1937 O 251 ibid.

. making the charge (1). In fact the ıestion of reasonable and probable cause :pends in all cases not upon the actual :istence, but upon the reasonable and bona-le belief in the existence of such a state of :ings as would amount to a justification the course pursued in making the accu-tion, whether the belief arises out of the collection and memory of the accuser or ıt of the information furnished to him by .other. Where the complaint is filed by e defendant on the information given by .other the Court has to see how far the fendant can be said to have reasonably ıd discreetly trusted the informer(2). The ıestion would be did he believe in the formation ? Was the information credible d would a prudent man have acted on ch information ? And were there asonable grounds for believing in such formation (3) ? The question whether a asonable man would or would not act ›on the information depends in a great gree upon the opinion to be formed of e position and circumstances of the infor-ınt and of the amount of credit which ıy be due under those circumstances to e person who thus conveys the informa-›n (4). Reasonable and probable cause us means reasonable grounds for believing

Questions where defendant acted upon information.

Position and circumstances of the informant.

(1) 49 I.C 232, 14 C.W.N 86 supra, 18 M 136 (police constable l liable), 34 M.L.J 517 : 23 M.L.T 341 : 1918 M.W.N 454 : 45 I.C 803.
(2) 10 R 282 : 138 I.C 693 : I.R 1932 R 161 : A.I.R 1932 R 80.
(3) 46 L.W 680 : A.I.R 1937 M 679.
(4) Same as (2).

that the plaintiff was guilty of the offence charged and not reasonable grounds for coming to the conclusion that the Court would convict him of it (1). Where the complainant honestly believes that the accused has committed the offence of which he complains, although he may not succeed in proving the truth of his allegations to the satisfaction of the criminal court, it cannot be held that the accusation was without any reasonable and probable cause. The criterion is the honesty of the complainant's belief and not his failure to establish his case. If the accusation is not brought recklessly with the specific intention of causing damage to the plaintiff's reputation, the complaint is not without reasonable and probable cause (2). And there should be no distinction drawn between reasonable cause and probable cause (3).

Honest belief sufficient though case not established.

Honesty the criterion.

Illustration.

Where there were long standing feuds between the families of the plaintiff and the defendant and the latter's son was murdered and the defendant prosecuted the plaintiff for the murder on the strength of the allegation in the dying declaration and the statement of witnesses, the defendant had reasonable and probable cause for the prosecution (4) Where after a

Prosecution on dying declaration and statement of witnesses.

(1) 36 M 375 : 24 M.L.J 515 : 19 I.C 665, 60 P.R 1902.

(2) 18 N.L.J 126 : A.L.R 1935 N 47.

(3) 26 M.L T 214 : 1920 M.W.N 171 : 10 L.W 314 : 53 I.C 70. But see 32 S.L.R. 1 : 173 I.C 407 : A.I.R 1938 S 11

(4) 32 P.R 1917 : 47 P.W.R 1917 : 66 P.L.R 1917 : 38 I.C 678.

theft in his house, the defendant informed the police, gave particulars of the stolen articles and also stated that he suspected the plaintiff, and the police arrested the plaintiff, kept him in hajat, and eventually finding no evidence connecting him with the theft submitted a final report on which he was discharged by the Magistrate, in such a case, it has been seen (p. 185), a suit for malicious prosecution does not lie as there was no prosecution of the plaintiff. But even assuming that there was a prosecution, it is impossible to hold that the defendant was liable for damages, if there is no evidence to suggest that he went beyond giving a true information of the occurrence and also a true statement of the fact that he suspected the plaintiff. Besides, if the repute and antecedents of the plaintiff were bad it cannot be said that the defendant acted without reasonable and probable cause in giving information to the police (1). If in any case the facts known to the would be prosecutor reasonably are such as to cause him fairly and honestly to conclude that the accused is guilty of the offence, there is no law which compels him to prosecute further enquiries in order to ascertain whether there is further information obtainable in support of the prosecution on which he has decided. And where the facts avail-

Naming plaintiff in information of theft.

When the facts are cogent enough further enquiries unnecessary.

(1) 57 C 25 : 125 I.C 667 : I.R 1930 C 587 : A.I.R 1930 C 392.

None where the facts make out a prima facie case.

able to the prosecutor at or before he puts the criminal law in motion make out a prima facie case against the accused, he is under no duty to ascertain whether there is a defence to the charge (1).

Illustrations.

The defendant instituted a criminal prosecution against the plaintiff under s. 482 of the Indian Penal Code for infringement of trade mark without success and the plaintiff thereupon sued the defendant for damages for malicious prosecution. The two marks in question were found to be similar enough so as to mislead purchasers. The criminal prosecution could not be said to be without reasonable and probable cause and the suit failed (2). Where the defendant had no honest belief in the guilt of the plaintiff, but was moved by the disappointment he experienced in not being able to reap the fruits of his purchase at a court sale, he could not be held to have had reasonable and probable cause for instituting a prosecution for theft (3). An honest belief in the guilt of the plaintiff based on reasonable grounds is the very essence of reasonable and probable cause. The plaintiff sold certain land to the defendant. The plaintiff expressly refused to guarantee good title with regard to anything which

Honest belief essence of reasonable and probable cause.

Illustrations.

(1) 42 C.W.N 1219 : A.I.R 1938 C 829. See 32 S.L.R 1 : 173 I.C 407 : A.I.R 1938 S 11.

(2) 43 L.W 210 : 160 I.C 428 : A.I.R 1936 M 8.

(3) 45 B 227 : 22 Bom L.R 1207 : 59 I.C 520 (belief must be based on grounds which, or some of which are reasonable and arrived at after due enquiry).

might have happened before the land came into his possession. Before the actual date of transfer he had told the defendant to make his own enquiries but the defendant failed to make any reasonable enquiry. Subsequently it was discovered that there was an encumbrance and the defendant suffered some loss in making over the land to his mortgagee. The defendant demanded of the plaintiff to make good the loss he had suffered, and on his refusal brought a criminal case for cheating against the plaintiff which ended in the plaintiff's favour. The plaintiff thereupon sued the defendant for damages for malicious prosecution. The defendant obviously had no honest belief in the plaintiff's guilt and so the prosecution was for some subsidiary purpose without reasonable and probable cause (1). Similarly, the mere fact that goods ordered are not paid for, but are found in a third person's shop, is not a reasonable and probable cause for instituting a prosecution for cheating (2). But a business man who finds his goods in another man's godowns as the consequence of a forged railway receipt is certainly entitled to think that there has been a case of forgery, and whether or not he bears malice, he must be taken to have reasonable and probable cause for launching a prosecution (3).

Charge of cheating where title not guaranteed.

Cheating charge for goods ordered but not paid for.

(1) 176 I.C 765 : A.I.R 1938 R 121.
(2) 17 I.C 316.
(3) 20 M.L.J 261.

Criminal proceedings for ground of enmity.

If a party goes to court and says that owing to the existence of enmity he apprehends danger from his adversary and on that ground he asks the court to take proceedings under s. 107 Criminal Procedure Code, and the court decides the matter against him, then it will be very dificult to hold that it was a case which was without any reasonable and probable cause. The man had believed that the opposite party was his enemy and thereupon was apprehending danger. But an enemy has no right to concoct a case against his adversary in order to put him to trouble and if in a case it is found that with a view to support an imaginary story against an enemy, one has fabricated evidence to bloster up his case against the other, the prosecution in that case will cease to be one with reasonable and probable cause (1).

Part of charge without reasonable and probable cause.

If a person alleges certain facts for which there is and other facts for which there is not reasonable and probable cause he may be held liable in respect of the latter charge (2). Where however the information to the Magistrate which led to proceedings under s. 107 Criminal Procedure Code being taken against the plaintiff included more than one specific allegation, the fact that one of the accusations had not been supported by evidence was held to be no ground for awarding damages to the plaintiff

(1) 1936 A.L.J 594 : 1936 A.W.R 231 : 163 I.C 984: A.I.R 1236 A 537.
(2) 18 I.C 925. See 28 B 226 : 5 Bom. L.R 940.

when the case as a whole had not been found to have been laid without reasonable and probable cause (1).

Onus on plaintiff to prove absence of reasonable and probable cause.

The onus is on the plaintiff to show absence of reasonable and probable cause(2), and it must be affirmatively shown that there was absence of reasonable and probable cause (3), and not simply that it was improper, or had an ulterior object (4). The plaintiff must establish facts which are inconsistent with the existence of reasonable and probable cause (5). If the plaintiff fails to establish this, the case must be dismissed even if no evidence is called on behalf of the opposite party (6) Where the plaintiffs, who were women, did not offer themselves as witnesses to the fact that the prosecution was not justified and did not either offer any explanation for

Facts to be proved

Otherwise case to be dismissed.

(1) 85 I.C 476 : A.I.R 1925 Pat. 459.

(2) 48 C.W.N 12, ILR 195 B 547 : 47 Bom LR 304 : AIR 1945 B 320, ILR 1946 N 358 : 1946 NLJ 113 : 221 IC 666 : AIR 1946 N 46, 42 PLR 232 : 185 IC 652 : AIR 1939 L 504, 19 Pat LT 889 : AIR 1938 P 529, AIR 1938 N 522, 32 SLR 1 : 173 IC 407 : AIR 1938 S 11, 1937 ALJ 331 : 1937 AWR 323 : 1937 ALR 605 : 169 IC 799 : AIR 1937 A 417, 1938 ALJ 913 : 1938 ALR 892 : 1938 AWR 548 : 177 IC 986 : AIR 1938 A 568, 1935 AWR 490 : 156 IC 606 : AIR 1935 A 559, 36 M 375 : 24 M.L.J 515 : 19 I.C 665 : A.I.R 1929 A 265, 91 I.C 223, 99 I.C 638 : A. I. R 1927 L 120, 6 L. L. J 1 : 72 I.C 411 : A.I. R 1924 L 1, A.I.R 1929 M 286, 14 W.R 339, 17 W.R 283 : 11 B.L.R.P.C 321 (on appeal from 5 WR 134), 10 W.R 439, 19 B 717, 24 M 549, A.I.R 1933 N 299, 10 Mys L. J 12 (A I R 1929 A 878 referred to), 12 Mys L J 115. See 11 W.R 42 : 6 BLR 375 (n), if the charge is found to be false the defendant must show that he had reasonable and sufficient cause.

(3) 1936 ALJ 803 : 1936 AWR 645 : 164 IC 184 : AIR 1936 A 532, 1937 OWN 226 : 1937 OLR 121 : 167 I.C 523 : AIR 1937 O 251, 32 P.R 1917 : 47 PWR 1917 : 66 PLR 1917 : 38 I.C 678.

(4) 40 M 285 : 31 MLJ 264 : 34 I.C 401.

(5) 46 L.W 680 : AIR 1937 M 679.

(6) 1936 ALJ 803 : 1936 AWR 645 : 164 I.C 184 : AIR 1936 A 532, 1936 ALJ 256 : 1936 AWR 296 : 164 I.C 669.

their failure to appear in court, they were held not to have established their case (1).

Defendant not to prove existence.

It is not for the defendant to prove affirmatively as a defence that reasonable and probable cause existed (2). So where in a suit for damages for malicious prosecution the lower court wrongly places the burden upon the defendant and finds in favour of the plaintiff, the decision is wrong and would be set aside in appeal (3). Similarly, where the lower appellate court acted on the assumption that both parties had indulged in falsehood and that some damages ought to be awarded to the accused who were acquitted it was palpably an incorrect view and the decree was reversed (4). But as the plaintiff has to prove the negative he in general need only give slight evidence of such absence (5). The onus thus is not a stationary burden and when the plaintiff has given such evidence as, if not answered, would entitle him to succeed, the burden of proof is shifted on to the defendant (6).

Where burden wrongly placed on defendant.

Plaintiff need only give slight evidence.

Burden shifts to defendant.

Discharge by Criminal Court not evidence.

Discharge of the accused by the Criminal Court cannot be considered as evidence of want of reasonable and probable cause for

(1) 18 NLJ 333. See 41 Mys HCR 283.
(2) 12 Mys LJ 115 : 39 Mys HCR 162.
(3) 1936 ALJ 803 supra.
(4) 1935 AWR 490 : 156 IC 606 : AIR 1935 A 559.
(5) ILR 1945 B 547 : 47 Bom LR 304 : AIR 1945 B 320.
(6) 48 CWN 12 : 211 IC 310 : AIR 1944 C 64.

the prosecution (1). There is a presumption of innocence arising from acquittal but this will not entitle the plaintiff to succeed in the suit. He must establish further that there was no reasonable and probable cause for the defendant to prosecute him (2). It does not follow from acquittal that the defendant's version of the incident was wholly false or that he must have known it to be false. The defendant's story may be true in every single respect and yet the plaintiff may still have been innocent (3). Want of reasonable and probable cause cannot be inferred merely from the fact that the plaintiff is innocent of the crime imputed to him (4). So the mere acquittal does not absolve the plaintiff from his duty of proving independently of the acquittal that his prosecution was malicious and without reasonable and probable cause (5). The mere innocence of the plaintiff is not either prima facie proof of such absence. Though the judgment of the criminal court would be conclusive for the purpose of showing that the prosecution terminated in favour of the plaintiff, it is for the civil court to go

Only a presumption of innocence.

Absence of cause not inferred from innocence.

To be proved independently.

(1) 136 IC 757 : IR 1932 S 53 : AIR 1932 S 23 (11 BLR 321 PC followed), 30 P.L.R-J & K 16, 1937 OWN 236 : 1937 OLR 121 : 167 IC 523 : AIR 1937 O 251, 1936 OWN 722.

(2) 1937 ALJ 331 ; 1937 AWR 323 : 169 IC 799 : AIR 1937 A 417, AIR 1938 N 522.

(3) AIR 1938 N 522.

(4) 1946 AWR 238 : 1945 O W N 307 : 227 I.C 380.

(5) 42 P. L. R 232 : 185 I.C 652 : A.I.R 1939 L 504, 1938 A.L.J 913 : 1938 AWR 548 : 177 IC 986 : AIR 1938 A 568.

into all the evidence and decide for itself whether there was want of reasonable and probable cause for the prosecution and whether there was also malice (1). In fact the judgment of the Criminal Court (as already noted, p. 177) is not conclusive of the matter ; it lies on the Civil Court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause. The judgment of the Criminal Court can only be used to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. The Court cannot take into consideration the grounds upon which the acquittal was based (2). So the order of the Criminal Court acquitting the plaintiff is admissible in evidence. But what is admissible is not the whole judgment but that part of it which contains the finding and the order of acquittal. It would be only in those exceptional cases where the circumstances which resulted in the acquittal of the plaintiff became relevant, that the judgment can be looked at by the court, e.g. where a conviction was sought to be procured by false or perjured evidence. But ordinarily, apart from such circumstances,

Criminal Court's judgment not conclusive.

Proves only the fact of acquittal.

Grounds of acquittal irrelevant.

(1) ILR 1945 B 547 : 47 Bom LR 304 : AIR 1945 B 320.

(2) 56 M 641 : 65 M.L.J 146 : 37 L.W 623 : 1933 M. W.N 1304 : 143 I, C 825 : A. I. R 1933 M 429, 34 P. L. R 746 : 144 I. C 387 : A. I. R 1933 I, 461 (A.I. R 1926 B 306, A. I. R 1932 B 259 distinguished, A. I. R 1929 A 265 referred to, A. I. R 1926 P. C 46 relied on), I. L. R 1940 Kar 230 : 189 I. C 2 : A. I. R 1940 S 90, 41 Mys H.C.R 283.

the reasoning of the criminal court would not be relevant or admissible in evidence(1). In the absence of res judicata, the reasons upon which a judgment proceeds are entirely irrelevant in a subsequent litigation except in the special circumstances specially provided for in the Evidence Act. This law has been applied to suits for malicious prosecution. So in a suit for malicious prosecution the reason upon which the previous judgment of the criminal court is based is not relevant (2). The judgment of the criminal court acquitting the plaintiff cannot therefore be pleaded as a bar and the defendant will not be debarred from proving that the charge brought by him in the criminal trial was in fact true and that consequently the plaintiff was not entitled to recover damages (3). The Criminal Court's belief in the complaint is not sufficient proof of reasonable and probable cause (4), though of course a heavy onus lies on the plaintiff in such a case and it would require very strong evidence to show that the defendant had no reasonable cause when an impartial public servant after due and deliberate investigation and trial has believed the case to be true (5). The Court has to discover what

Reasoning of Criminal Court irrelevant.

Defendant not debarred from proving truth of his case.

Criminal Court's belief not sufficient.

Heavy onus on plaintiff to rebut such belief.

(1) I. L. R 1945 B 547 : 47 Bom L.R 301 : A. I. R 1945 B 320.

(2) A. I. R 1938 N 522.

(3) 1936 A. W. R 231 : 1936 A. L. J 594 : 163 I. C. 984 : A. I. R 1936 A 537.

(4) 10 A. L. J 423 : 17 I. C 879, see 15 Luck 404 : 1940 O. W. N 201 : 186 I. C 293 : A. I. R 1940 O 320.

(5) 35 L. W 495 : 137 I. C 829 : I. R 1932 M 464 : A. I. R 1932 M 601.

Court to decide on evidence.

facts have been found upon the evidence and then to decide whether on those facts it can be said that the prosecution was instituted without reasonable and probable cause (1). The Court has to see whether the charge was false to the knowledge of the complainant (2).

What Court is to see.

Where charge false to defendant's knowledge

No question of reasonable and probable cause however arises in a case where the charge must have been true or false to the knowledge of the defendant and in which there could be no mistake on his part (3). Where the falsity of the charge is proved to be known to the defendant, it is inconsistent with the existence of any reasonable and probable cause (4). It is however otherwise if at the time when he prosecuted the plaintiff he had no such knowledge and then it would not be taken that the defendant had acted without reasonable and probable cause. It is immaterial that he came to have that knowledge afterwards(5). Where the charge on the face of it is groundless the plaintiff will be absolved from giving further direct evidence of want

Where no knowledge at time of prosecution.

Subsequent knowledge immaterial.

Plaintiff absolved from giving evidence.

(1) 35 L. W 495 ibid.

(2) 10 A. L. J 423 supra.

(3) 11 A. L. J 125 : 18 I. C. 280, 116 I. C 853 : A. I. R 1929 A 265. Cf. 25 N. L. R 180 : 121 I. C 44 : A. I. R 1929 N 260, A. I. R 1930 A 216.

(4) 1944 A. L. W 127 : 1944 A. W. R 63 : 1944 O. W. N 64, 59 M 887 : 43 L. W 727 : 1936 M. W. N 392 : 70 M. L. J 605 : 162 I. C 794 : A. I. R 1936 M 547.

(5) 151 I. C 636 (if he persists in the prosecution after such knowledge it would be evidence of malice).

of reasonable and probable cause (1), and it will then lie on the defendant to show that he had such cause for making the charge (2). Where however proceedings are instituted upon expert advice but the advice eventually turns up to be wrong, it cannot be rightly said that the party in acting upon the advice had no reasonable and probable cause for the course he took (3). The opinion of counsel however as to the propriety of instituting a prosecution will not excuse the defendant from liability, unless he shows that he laid all the facts of his case fairly before him and acted bona fide on that opinion (4).

Onus shifts to defendant.

Proceeding started upon **expert advice.**

Conviction by the first court, though reversed on appeal, is prima facie evidence of reasonable and probable cause for the prosecution (5). Acquittal on appeal is not prima facie evidence that the charge was unreasonable and false (6). It is not however conclusive evidence (7), for the mere fact that one Court believed the complaint is not always a sufficient

Conviction by first court acquittal on appeal.

(1) A. I. R 1923 A 531, A. I. R 1929 N 260 supra.

(2) 11 W. R 42 : 6 B. L. R 375n, 20 W. R 177, 1 Ind. Jur. N. S 93. 6 N. W 200, 2 M. H. C. R 291.

(3) I. L. R 1945 A 685 : 1946 ALJ 53 : 1946 A. W. R 315 : 224 I. C 161: AIR 1946 A 204, 33 C.W.N 1034 : A. I. R 1929 P.C 222, See 9 M. L. J 110, 4 Bom. L. R 560, 40 P. R 1884.

(4) 1940 RLR 631 : 190 IC 830 : AIR 1940 R 230, 46 M. L. J 353 : 51 M. L. T 25 : 1924 M. W. N 382 : 19 L. W 397 : 77 I. C 787 : A. I. R 1924 M 565.

(5) I. L. R 1945 B 547: 47 Bom L. R 304 : A. I. R 1945 B 320.

(6) 25 B 332 : 2 Bom. L. R 939 : 4 C. W. N 781 P. C.. 4 P. R 1868, 19 P. R 1879, 1897 P. J. L. R 387.

(7) I.L.R 1945 B 547 supra.

evidence of reasonable and probable cause (1). A Court therefore ought not to try the issue as to malice and absence of reasonable and probable cause as a preliminary issue, upon the simple fact (without taking evidence) that the plaintiff had been convicted by the original Court though subsequently acquitted on appeal (2). The conviction, though not conclusive in defendant's favour, is taken into consideration in determining if there was reasonable and probable cause (3).

o hard and fast le.

It cannot however be laid down as a hard and fast rule that a suit for malicious prosecution is not maintainable where there is a conviction by the Court of first instance and an acquittal by the Appellate Court (4). In such a case the presumption ordinarily is against the absence of reasonable and probable cause, unless the original conviction is proved to have proceeded on evidence known to the defendant to be false, or on the wilful suppression by him of material facts (5). That is to say, in such a case the plaintiff who sues for damages has still to establish that the defendant acted without reasonable and

sumption inst absence.

(1) 50 A 713 : 26 A. L. J 439 : 110 I. C 413 : A. I. R 1928 A. 337.

(2) 4 Pat. L. T 202 : 1 Pat. L. R 332 : A. I. R 1923 P 344.

(3) 18 I. C 830. See 3 Pat. L. T. 93 : (1922) Pat. 26 : A. I. R 1922 Pat. 160.

(4) L. R 5 A 375 : 79 I. C 1023 : A. I. R 1924 A 536, 1936 A. W. R 231 : 1936 A. L. J 594 : 163 I. C 984 : A. I. R 1936 A 537.

(5) 89 I. C 432 : A. I. R 1926 N 175, 4 Pat. L. T 202 : 1 Pat. L. R 332 : A. I. R 1923 Pat. 341. See 12 C. L. J 410 : 6 I. C 675, 21 A 26, 26 M 506, 16 M. L. J 18.

probable cause and maliciously (1). In fact, it is the strongest possible evidence against the plea of want of reasonable and probable cause (2). Indeed, it has been held that a conviction though reversed in appeal is a fatal defect to the plaintiff's suit for malicious prosecution except in exceptional circumstances (3). A conviction unreversed on appeal bars an action for malicious prosecution (4).

Fatal defect.

That it was malicious

Malicious Prosecution means that the proceedings were initiated in a malicious spirit, i. e., from an indirect and improper motive and not in furtherance of justice (5). No action will lie for institution of

No action if no malice.

(1) I. L. R 1939 Kar 375 : 1939 A. L. J 752 : 1939 A. W. R 162 : 1939 O. L. R 510 : 1939 O. W. N 730 : 1939 O. A 715 : 50 L. W 414 : 5 B.R 951 : 20 Pat. L.T 721 : 183 I.C 196 : A. I. R 1939 P. C 225 : See 60 C 1022 : A.I.R 1933 C 909 (sanction to prosecute reversed on appeal is acquittal).

(2) 49 I. C 232, 10 W. R 439, 13 W. R 276, 12 C. L. J 410, 4 Pa. L. T 202, 3 M 6, 3 M. H. C. R 238 (239), 24 M 549, 21 A 26, 2 N. W 88, (1886) P. J 9, 10 A. L. J 423.

(3) 8 Bur. L. T 69 : 8 L. B. R 78 : 29 I. C 883, 2 L. B. R 111, (1906) U. R. R 5, I. L. R 1945 B 547 : 47 Bom L. R 304 ; A. I. R 1945 B 320.

(4) 13 W. R 118, 2 M. H. C R 158.

(5) 10 C. W. N 253, 27 C 532, 9 M. L. T 172 : (1911) 1 M. W. N 149, 5 R 705 : 106 I. C 654 : I. L. T 40 R 29 : A. I. R 1928 R 31, 50 A 713 : 26 A. L. J 439 : 110 I. C 413 ; A. I. R 1928 A 337, 56 B 135 : 34 Bom L. R 143 : 137 I C 545 : I. R 1932 B 275 : A. I. R 1932 B 259, I. L. R 1945 B 547 : 47 Bom L. R 304 : A. I. R 1945 B 320. See 3 Bur. L. T. 78 : 8 I. C 458, 17 C. W. N 554 : 17 C. L. J 105 : 18 I. C 737, 34 M. L. J 517 : 23 M. L. T 341 : 1918 M. W. N 454 : 7 L. W 604 : 45 I. C 803. Also see 8 Bur. L. T 69 ; 8 L. B. R. 78 : 29 I C 883, 18 I. C 830, 10 O. L. J 468 : 79 I. C 697 : A I. R 1924 O 145, A. I. R 1926 N 175, 6 C. W. N. 298, 28 C 591, 11 B. L. R. 321 P. C., 25 B 332 infra, 1 Agra 38, (1882) 2 A. W. N 83, (1885) 5 A. W. N 175, 18 M 136, 2 M. H. C. R 158, 8 M. H. C. R 151, 48 C. W. N 258 : 47 Bom L. R 566 : 1944 A. L. J 137 : (1944) 1 M. L. J 40 : 211 I. C 141 : A. I. R 1944 P. C 1 infra, 77 C.L.J 93 : 212 I. C 421 : A. I. R 1944 C 4, 3 A. W. R 614 : 151 I. C 359 : A. I. R 1934 A 696, 164 I. C 1074 : A. I. R 1936 S 133, 19 Pat. L. T 889 : A. I. R 1938 P 529.

legal proceedings however destitute of reasonable and probable cause unless they are instituted maliciously, that is to say, from some wrongful motive (1). The foundation of an action for malicious prosecution thus is malice (2). Malice means the presence of some improper and wrongful motive, that is to say, an intent to use the legal process in question for some other than its legally apointed and appropriate purpose (3). Any indirect and improper motive is malice (4). Any unjustifiable intention to inflict injury by launching a prosecution, any motive other than the motive of simply instituting a prosecution for the purpose of bringing a person to justice is malice (5). So that malice is proved if it is shown that the defendant acted from some indirect motive in instituting a false case against the plaintiff (6). Proof of malice is essential in an action for malicious prosecution and there must be a finding of malice. Where a man is deliberately and falsely implicated in a charge, the improper motive is obvious. Such a finding is in fact a finding of malice in law.

alice foundation of action.

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ding of malice.

(1) ILR 1945 B 547 : 47 Bom L.R 304 : AIR 1945 B 320.

(2) 136 I. C 757 : I. R 1932 S 53 : A. I. R 1932 S 23 (Malice is a necessary ingredient in a suit for damages for malicious prosecution). See also (3).

(3) I. L. R 1945 B 547 : 47 Bom L. R 304 : A. I. R 1945 B 320, 39 Mys H. C, R 162.

(4) 3 A.W.R 614 : 151 I.C 359 : A. I. R 1934 A 696, 164 I.C 1074 : A. I. R 1936 S 133.

(5) 164 I. C 1074 : A. I. R 1936 S 133.

(6) I. L R (1938) 1 C 202.

There is no magic in the word malice and it is quite unnecessary for the court to use the word malice so long as the facts found by it amount to malice in law (1). Where although there is no express finding as to malice and want of reasonable and probable cause, yet a finding that the defendant brought the charge against the plaintiff without knowing the culprit and that he considered it a capital opportunity to implicate his enemy is equivalent to a finding of malice (2). An accusation which has been held by the Criminal Court to be unfounded is prima facie evidence of malice (3).

Finding which amounts to finding of malice.

This malice may exist (as already noted, p. 195) at any time in the course of the enquiry (4). Ordinarily the absence of reasonable and probable cause in instituting a proceeding which terminates in favour of the plaintiff would give rise to the inference of malice (5). The plaintiff may thus rely upon the want of reasonable and probable cause itself as it is in certain cases

Malice at any time in course of proceeding.

Inference of malice.

(1) 3 A. W. R 614 : 151 I. C 359 : A. I. R 1931 A 696. Where a person prosecutes another knowing full well that the prosecuted person is not guilty of any offence there cannot be any reasonable and probable cause for the prosecution, and whatever his motive may be, to embark upon a prosecution without reasonable and probable cause amounts to malice in law, 59 M 887 : 43 L. W 727 : 70 M. L. J 695 : 1936 M. W. N 392 : 162 I. C 791 : A. I. R 1936 M 547.

(2) 9 M. L. T 172 : 1911 M. W. N 149 : 8 I. C 884, A. I. R 1930 A 742.

(3) 6 W. R 29.

(4) 81 I. C 1014 : A I. R 1925 N 216, 46 A 815 : 22 A. L. J 761 : L. R 5 A 536 : 80 I. C 874 : A. I. R 1924 A 845.

(5) 1 C. W. N 537, 10 C. W. N 253, 11 W. R 42 : 6 B. L. R 375n, 20 W. R 177, 24 A 363, 13 M 394, 2 M. H. C. R 291, 6 M. H. C. R 85, 24 M 549, 10 P 842 : 135 I. C 526 : I. R 1932 P 46 : A.I.R 1932 P 91, 51 L W 635 : 1940 M. W. N 305 : (1940) 1 M. L. J 668 : A. I. R 1940 M 683.

Something more than absence of reasonable cause.

sufficient evidence of malice. But ordinarily there must be something more of the nature of indirect and sinister motive for the prosecution than the mere absence of reasonable and probable cause (1).

A state of one's mind.

Malice, like intention or motive, is a state of one's mind known to himself, the existence of which is to be gathered from the circumstances of the case and the conduct of the parties, the absence of reasonable and probable cause is not by itself sufficient evidence of malice (2).

There must be both malice and absence of reasonable cause.

As already seen (p. 178), malice and absence of reasonable and probable cause must both be present, and the plaintiff must fail altogether if he cannot establish both (3). Absence of reasonable and probable cause and malice must unite in order to produce liability. So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability and conversely, if there are reasonable grounds for the proceedings, no impropriety of motive on the part of the person instituting the proceedings is in itself any ground

No liability if one or other absent.

(1) I. L R 1945 B 547 : 47 Bom L. R 304 : A. I. R 1945 B 320.

(2) 32 S. L. R 1 : 173 I. C 407 : A. I. R 1938 S 11.

(3) 77 C. L. J 93 : 212 I. C 421 ; A. I. R 1944 C 4, 1938 A. L. J 913 : 1938 A.L.R 802 : 1938 A.W.R 548 : 177 I.C 986 : A.I.R 1938 A 568, 6 L.L.J 1 : 72 I C 411 . A. I. R 1924 L 1, 25 B 332 : 2 Bom. L. R. 939 : 4 C. W. N 781 P. C., 2 M. H. C. R 158, 291, 8 M. H. C. R 151, 6 B. L. R 371 : 14 W. R 425, 3 W. R 169, 12 W R 402 : 6 B. L. R 377 (n), 19 B 717, 6 Bom L. R 704, 56 B 135 supra, 10 Mys. L J 12 (the burden is on him,-A. I. R 1929 A 878 referred to), 12 Mys. L. J 115. See 1 Agra 38.

for liability (1). If the defendant had reasonable and probable cause for launching the criminal prosecution, no amount of malice will make him liable for damages (2)

If reasonable cause, malice irrelevant.

So the mere institution of a prosecution without reasonable and probable cause is not sufficient to justify a decree in a suit for malicious prosecution, if the defendant honestly believed that the plaintiff had committed a criminal offence. It is necessary to show that the prosecution was malicious. Where a prosecution is obviously false and not instituted in good faith there is malice, but where a prosecution has been instituted under a bonafide belief in the guilt of the accused, even though that belief is mistaken, the plaintiff cannot get a decree for damages even if an enquiry would have shown that no offence had been committed (3). Where on the information of a person the police investigates a case and sends it up for trial, in the absence of proof that the informant intentionally gave false information, he can not be said to have acted maliciously merely because he had been told by some one that the man was innocent, or because the informant engaged a counsel for the prosecution (4)

No liability for prosecution in bonafide belief though mistaken.

(1) I. L. R 1945 B 517 : 47 Bom L. R 304 : A. I. R 1945 B 320, 39 Mys H. C. R 162.

(2) 1946 O.W.N 307 : 1946 O.A 238 : 1946 A.W.R 238 : 227 I.C 380.

(3) 3 R 82 : 4 Bur. L. J 69: A. I. R 1925 R 221, (1918) 3 U. B. R 67 : 46 I. C 337, 12 C. L. J 410, 26 M. L. T 214, 143 P. R 1919 infra, 7 Mys. L. J 345, 1943 A. L. W 601.

(4) 117 I. C 62 : A. I. R 1929 R 63, 57 C 25 : A. I. R 1930 C 392. See P 204-b.

Malice not in law but in fact.

The malice necessary to be proved is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact, malus animus, indicating that the party was actuated

Spite or ill-will.

by spite, or ill-will towards the plaintiff, or by indirect and improper motives though unconnected with any uncharitable feeling towards him (1). The term 'malice' indeed does not necessarily imply personal spite or grudge or ill-will or enmity or hatred on the part of the defendant but only means

Improper motive, not vindication of law.

an indirect or improper motive other than a desire to vindicate the law, namely, public justice or a private right (2). It may be due to a desire to obtain a collateral advantage (3). Anger is at times relied upon

Anger.

as an indication of malice, but hastiness in defendant's conclusion as to the plaintiff's guilt carries no such indication(4). In fact, a prosecution is not malicious merely because it is inspired by anger. However wrong-headed a prosecutor may be, if he honestly thinks that the defendant has been guilty of a criminal offence he cannot be the ini-

(1) ILR 1945 B 547 : 47 Bom L. R 304 : A.I.R 1945 B 320, 1946 A.W.R 238 : 1946 O.W.N. 307 : 1946 O. A 238 : 227 I. C 380, 6 L. L. J 1 supra, 161 IC 617 : AIR 1936 R 7. But see 30 M. L.T 214 : 1920 M. W. N 1/1 : 10 L. W 314 : 53 I- C 70 (the use of the expression legal malice as distinguished from malice in fact is misleading).

(2) I. L. R 1946 N 358 : 1946 N. L. J 113 : 221 I. C 666: A. I. R 1946 N 46, 143 P. R 1919 : 54 I. C 950, 6 Bur. L. T 59 : 20 I. C 180, 3 Bur L. T 78 : 8 I. C 458, 24 A 363, A. I. R 1930 A 216, 19 Pat L. T 889 : 5 B. R 120 : A. I. R 1938 P 529, 1943 M. L. R 43.

(3) I.L.R 1946 N 358 : 1946 N.L.J 113 : 221 I.C 666. A. I. R 1916 N 46.

(4) 6 L. L. J 1 supra, 26 M, L. T 214 supra, 36 M 375 : 24 M. L. J 515 : 19 I. C 665.

tiator of a malicious prosecution (1). Mere carelessness (or recklessness) on the part of the defendant in deciding whether there was reasonable and probable cause will not amount to malice ; but where the accusation is made and the prosecution instituted without any basis whatsoever and recklessly malice may be inferred (2). It was not malicious where a Magistrate charged the appellant with an offence under section 228 Indian Penal Code for walking in his view with shoes on and let him off after apologizing (3). Where the defendant persists in prosecuting a false charge after knowing that there is no ground to justify the prosecution it would amount to evidence of malice (4). Where the complaint is false to the knowledge of the defendant malice must be inferred (5). In such a case, where enmity also exists between the parties, it must be presumed that the defendant was actuated by malice in institu-

Carelessness or recklessness.

Prosecution persisted after knowledge of innocence.

Complaint knowingly false.

Enmity between parties.

(1) 48 C. W. N 258 : 1944 A. L. J 137 : 1944 A W. R 11 : (1944) 1 M L. J 40 : 1944 M.W.N 182 : 57 L. W. 81 : 24 Pat L.T 395 : 1944 P. W. N 1 : 10 B. R 413 : 10 Cut L. T 1 : 211 I. C 141 : I. L. R (1944) Kar 47 : A. I. R 1944 P. C 1.

(2) 36 M 375 supra, 2 U. P. L. R (A) 427, 28 N. L. R 312, 51 L. W 635 : 1940 M. W. N 305 : (1940) 1 M.L.J 668 : A. I. R 1940 M 683.

(3) 9 M L. T 144 : (1911) 1 M. W. N 319 : 10 I. C 391.

(4) 151 I. Cobb. Prosecuting another person on a groundless charge for the purpose of establishing his claim to a sum of money to which he is not entitled is obviously malicious, 1943 M. L. R 53.

(5) 16 A. L. J 468 : 46 I. C 190, 11 A. L. J 125 : 18 I. C 280, 9 A. W. N 189, 10 A. W. N 213, 24 A 363 (367), (1918) 3 U. B. R 67 : 46 I. C 337, 5 O. W. N 1039, 46 M. L. J 353 : 34 M. L. T 25 : 1924 M. W. N 382 : 19 L. W 397 : 77 I. C 787 : A. I. R 1924 M 565 (the prosecution was to put pressure on the plaintiff to compromise a civil dispute then pending between the parties), A.I. R 1930 A 216. See 6 N.W 200, 194 I. C 374 : A.I.R 1941 C 13, 1940 Rang L. R 631 : 190 I. C 830 : A.I.R 1940 R 230, 12 Mys L.J 115, A. I. R 1944 O 232 infra, 1943 M. L. R 53.

Counter prosecution.

ting the prosecution (1). Where in a suit for damages for malicious prosecution the ground alleged by the defendants was that they would not have started the prosecution but for one of the plaintiffs filing against them a complaint under s. 211, Indian Penal Code, after a settlement had been reached before the police as the result of which the original complaint was dropped as being of a civil nature, it was held that in such a case the malice became definite and clear beyond doubt, in as much as the motive which prompted the prosecution was not the laudable one of bringing an offender to justice, but of retaliating against the plaintiff because of the attack made by him (2).

Malice not inferred from failure of prosecution.

Malice in the prosecutor cannot however be inferred from the mere fact that the prosecution has failed (3). The judgment of the Criminal Court discharging or acquitting the plaintiff is no evidence either of malice, or of want of reasonable and probable cause (4). And malice should not be ordinarily inferred where the Appellate Court acquits the plaintiff (5).

Judgment of Criminal Court no evidence of malice.

Not inferred from acquittal on appeal.

Burden of proof on plaintiff.

As seen, the burden of proving the existence of malice (like want of reasonable and

(1) 1944 A. L. W 127 : 1944 A. W. R 63 : 1944 O. W. N 64 : A. I. R 1944 O 232.

(2) (1946) 2 M.L.J 484 : 1947 MWN 374 : 60 L.W 316 : A.I.R 1947 M 236.

(3) 14 C. W. N 86 : (1909) A. C 549 : 5 I. C 50 P. C., 12 W. R 402, 6 B. L. R 377 n, 3 U. B. R 67.

(4) 8 O. L. J 147 : 61 I. C 970, 50 A 713 : 26 A. L. J 439 : 110 I. C 413 : A.I.R 1928 A 337.

(5) 3 Pat. L. T 93 : (1922) Pat. 26 : A. I. R 1922 Pat. 160. See P. 177.

probable cause) lies upon the plaintiff(1), and it should be independently proved and not inferred merely from the absence of reasonable and probable cause (2). In fact, the question of malice does not arise until a stage has been reached subsequent to that in which it has been determined that there was no reasonable and probable cause for the prosecution (3). The Court will go into all the evidence and decide for itself whether such malice or cause existed or not (4). Malice may sometimes be inferred from the absence of reasonable cause, but the existence or non-existence of reasonable cause should be determined by the Court on the evidence before it, and not on the evidence in the Criminal Court (5). The judgment of the Criminal Court will be admitted in evidence (6), but the proceedings in the Criminal Court are not evidence in a Civil Court (7).

To be independently proved, not inferred.

Question of malice when arises.

Court to decide on evidence.

Evidence in Criminal Court not evidence.

From want of reasonable and probable cause malice may be and is sometimes inferred, but from the most express malice want of reasonable and probable cause cannot be inferred and the most express malice will

Malice and want of reasonable and probable cause.

(1) 14 C. W. N 86 supra, 10 Mys. L. J 12 (A. I. R 1929 A 878 referred to). See P. 222 (3).

(2) 99 I. C 638 : A. I. R 1927 L 120, 164 I. C 1074 : A. I R 1936 S 133, 1937 O. W. N 226 : 1937 O. L. R 121 : 167 I. C 523 : A. I. R 1937 O 251. See P 178, 221.

(3) 48 C. W. N 12 : 211 I. C 310 : A. I. R 1944 C 64.

(4) 50 A 713 supra.

(5) 10 P 842 : 135 I. C 526 : I. R 1932 P 46 : A. I. R 1932 P 91.

(6) 1 C. W. N 537, 60 P. R 1902. See P. 201.

(7) 9 Bom. L. R 1134, 14 W. R 339. See P. 177, 201, 214 and 226.

not give a cause of action if reasonable and probable cause existed (1). If the defendant had reasonable and probable cause for prosecuting the plaintiff when he originally set the criminal law in motion, it is immaterial if subsequently in the course of the proceedings the innocence of the plaintiff became clear and the defendant nevertheless persisted in the prosecution. This may amount to evidence of malice but not to a negation of the plea of reasonable and probable cause. The fact that malice is proved is not evidence of the absence of reasonable and probable cause (2). Where in arriving at a finding as to the existence of reasonable and probable cause, the relation between such cause and malice has not been kept in view and the two have not been clearly distinguished, the finding is liable to be set aside in second appeal (3).

The distinction o be kept in view

DAMAGES.

Object of lamages.

Damages in malicious prosecution are awarded to compensate the plaintiff for expenses incurred in the prosecution, for loss of reputation etc., which he has actually suffered and as a solatium for injury to his feelings i. e., for mental distress and bodily

(1) ILR 1945 B 547 : 47 Bom. L.R 304 : AIR 1945 B 320, 8 O. I. J 147 : 61 I. C 970, 42 C 550 : 18 C. W. N 1189 : 21 C. L. J 68 : 26 I. C 296. See 17 M. L.T 391 : 2 L. W 428 : 29 I.C 12. See P. 221, 222.

(2) 10 R 282 : 138 I. C 693 : I. R 1932 R 161 : A. I. R 1932 R 80, 56 M 641 : 65 M. L. J 146 : 1933 M. W. N 1304 : 37 L.W 623 : 143 I.C 825 : A I.R 1933 M 429.

(3) I. L. R 1945 A 685 : 1946 A. W. R 345 : 224 I. C 161.

discomfort caused (1), and for injury to his person or property (2), but not for injuries which he might have suffered if he had been convicted (3), i.e., the damages must be the reasonable and probable result of the malicious prosecution and not too remote. There is no method of measuring the money value of the injuries caused to the plaintiff by the action of the defendant and the only limit to the damages to be awarded is that they must be reasonable in amount and there must be some reasonable relation between the wrong done and the solatium applied. The damages awraded for loss of reputation are in the nature of a solatium and are not given either for punishing the defendant or for enriching the plaintiff (4). Law has not laid down what shall be the measure of damages in an action for malicious prosecution. The measure is vague and uncertain depending upon a variety of facts, such as conduct of the parties and circumstances of the case. When a wrong has been committed, the person claiming damages must suffer from

Not for possible injuries.

Not too remote.

Reasonable and probable.

Solatium for loss of reputation.

No certain measure.

(1) 1 C W. N 537, 12 W. R 89, 14 W. R 443, 100 I. C 449 : A. I. R 1927 A 412, 6 Bur L. T 59 : 20 I. C 180, 82 I C 1014 : A. I. R 1925 N 216, 122 I. C 185 : A. I. R 1930 A 165; 8 C 710 : 41 C. L. R 215, 27 I. C 410, 1944 A L W 171. See 136 I. C 757 : I. R 1932 S 53 : A. I. R 1932. S 23 (the Court in a suit for damages for malicious prosecution can take into consideration not only the injury to the reputation of the plaintiff bnt also the danger to liberty). See 1 Ind. Jur. N S 93, also 20 M. L. T 308.

(2) 1944 A. L. W 171.

(3) 100 I. C 449 supra.

(4) I L R 1946 N 358 : 1946 N L J 113 : 221 I. C 666 : A I R 1946 N 46.

the impossibilities of actually ascertaining the amount of damages but that does not mean that he is exonerated from giving the best proof available for the extent of damages suffered by him (1).

ecial damage be proved in oceedings not minal.

No special damage need be proved except when the proceedings are not criminal in which case it is necessary to prove that there has been some special damage caused to the plaintiff (2). Thus if a criminal case for misappropriation was proceeding against a person, it is a very good reason why he could not obtain service, as employers would naturally be chary of engaging a man against whom there were allegations of misappropriation and breach of trust and therefore such a person would be entitled to sue for damages for malicious prosecution for loss of service, if any, for the period during which the criminal proceedings lasted (3). Conversely, no claim for damages can be made on the ground that the plaintiff's shop was shut during trial when no damage is proved from that cause. A mere statement that plaintiff pays a certain income tax does not show that any part of it was earned in trading on a particular shop and does not serve as basis for damages (4).

(1) 32 S. L. R 1 : 173 I. C 407 : A. I. R 1938 S 11.
(2) 9 M. L. T 172 : (1911) 1 M.W.N 149 : 8 I.C 884.
(3) A. I. R 1933 N 299.
(4) 122 I. C 185 : A. I. R 1930 A 165, 9 O. W. N 1067.

All damages flowing from wrongful act.

In actions for trot the wrongdoer is liable to pay all the damages naturally and directly flowing from the wrongful act. So the plaintiff in an action for malicious prosecution is entitled to the expenses incurred by him in defending himself and in resisting any application for revision filed by the defendant to set aside the order of discharge passed by the magistrate (1). So the plaintiff is entitled to legitimate expenses incurred in defending himself in the Criminal Court (2). Counsel's and vakil's fees thus should also be allowed (3), and full costs may be awarded though only a part of the claim is decreed(4). And where the plaintiff has given evidence which has not been contradicted that he incurred the entire expenses of the criminal case, he alone is entitled to recover the same regardless of the fact that there were other accused in the criminal case (5). Where however it is found that the plaintiff has not spent anything towards the expenses of defence, the amount being paid by another person, and there being no legal liability to repay the amount so provided, no damages can be awarded, the plaintiff

Expenses incurred in defence.

Counsel's fees.

Full costs of suit,

Where one of several accused met the entire xpenses of defence.

Where plaintiff did not meet the expenses.

(1) I. L. R 1946 N 358 : 1916 NLJ 113 : 221 I C 666 : A I R 1946 N 46.

(2) 136 I. C 757 : I. R 1932 S 53 : A. I R 1932 S 23 (31 C 406 followed); 1944 A. L. W 171, 1943 M. L. R 53, LL.R 1945 B 347 : 47 Bom L. R 304 : A I R 1945 B 320.

(3) 9 M. L. T 172 : (1911) 1 M. W. N 149 : 8 I. C 884, 5 M 162, 1943 M L R 53. But see 6 M. H. C. R 85.

(4) 14 P. L. R 1916, 9 M. L. T 172 ibid.

(5) 1936 A. L.J 594 : 1936 A. W. R 231 : 163 I. C 984 : A. I. R 1936 A 537.

having failed to prove that he has sustained any damages as a result of the prosecution (1).

mages on two ads : arrest d prosecution.

There is no legal mistake in the method adopted by a Court in assessing damages under two heads, (a) the malicious arrest and (b) the malicious prosecution (2).

icretion of al Judge.

The trial Judge has a wide discretion, on the facts of the case before him, to say what in his view the damages should be and the Appellate Court will not interfere

ellate Court's rference.

and substitute its discretion, unless it is found that the trial Court erred in law in awarding the damages it did (3).

mplary

Exemplary damages are awarded, rather to express indignation at the defendant's wrong than as representing the plaintiff's loss (4). The fact that the defendant applied in revision to set aside the order of discharge is not however a circumstance which aggravates the damages and entitles the plaintiff to claim exemplary or compensatory damages (5). Where the defandant in an action for malicious prosecution and for procuring a malicious house search is found to have been actuated by malice, the

(1) 122 I.C 185 : A.I.R 1930 A 165, 9 O.W.N 1067.

(2) 99 I. C 638 : A. L. R 1927 L 120.

(3) 46 M. L. J 353 : 34 M. L. T 25 : 1924 M. W. N 382 : 19 L. W 397 : 77 I. C 787 : A. I. R 1924 M 565, 1945 N. L. J 158 : L.I. R 1945 N 349 : A. I. R 1944 N 292. See 3 C. L. J 140, 10 W. R 164, 31 A 333 : 6 A. L. J 381 : 1 I. C 760.

(4) 62 M. L. J 107 : 34 L. W 898 : 135 I. C 619 : I. R 1932 M 187 : A. I. R 1932 M 53.

(5) I.L.R 1946 N 358 : 1946 N.L.J 113 : 221 I.C 666 : A.I.R 1646 N 46.

existence of strained relations between the parties for a long period is a ground for the award of exemplary damages instead of refusing it. The award of exemplary damages for torts in cases where the defendant has acted contumeliously is sanctioned ont only by the English law but also by decisions of the High Court applying the Indian law (1).

Nominal damages.

Where both the plaintiff and the defendant are actuated by malicious motives, nominal damages must be awarded (2). Where the plaintiff appeared voluntarily after an order for summons under S. 204 Criminal Procedure Code was recorded but before it was served and the magistrate subsequently modified the process into one under S. 202 of the Code, it was held that though the plaintiff had a cause of action, he was only entitled to nominal damages (3).

Miscellaneons

Second appeal.

Though the basis for a finding of absence of reasonable and probable cause and the presence of malice in a suit for damages for malicious prosecution, consits in matters of fact, the inference that should be drawn from the proved facts and the question

(1) (1945) 2 M. L. J 461 : 58 L. W 613 : 1945 M. W. N 720 : 224 I.C 523 : A.I.R 1946 M 147.

(2) 112 P. R. 1901.

(3) 12 P 292 : 14 Pat L. T 588 : 145 I. C 271 : I. R 6 P 147 : A. I R 1933 Pat 292.

whether those facts are sufficient to establish the absence of reasonable and probable cause and the presence of malice, are matters of law, upon which interference in seccond appeal is permissible (1). There is also the contrary view, namely, that in an action for damages for malicious prosecution, the question as to the existence of malice or absence of reasonable and probable cause is one of fact and the High Court will not interfere in second appeal with the finding of the Lower Court on the point (2).

Cause of action.

In malicious prosecution cause of action may be defined as every fact or the bundle of essential facts which it would be necessary for the plaintiff to prove if traversed by the defendant in order to support the plaintiff's right to judgment (3). The cause of action for malicious prosecution commences from the date of discharge or acquittal of the plaintiff and is not suspended by the possibility of the decision being set aside on revision (4). The whole pro-

(1) 49 L. W 664 : 1939 M. W. N 593 : (1939) 2 M. L. J 206 : 188 I. C 801 : A. I. R 1939 M 783, 1 Pat L. J 149 : 3 Pat. L. W 415 : 34 I. C 149 (it is a question of law to be determined upon facts proved). See 28 C 591, 15 C L J 410, 7 Bom. L. R 655, (1872) P. J 183, (1938) A. C 307 : 107 L. J (K. B) 225.

(2) (1946) 2 M. L. J 484 : 1947 MWN 324 : 60 L.W 316 : A.I.R 1947 M 236, 1946 O.W.N 330 : 1946 A.W.R 231 : 1946 O. A 231 : 227 IC 445 : A.I.R 1947 O 88, 25 B 332 : 2 Bom. L.R 939 : 4 C.W.N 781 P.C., 26 M. L. T 214 : 1920 M. W. N 171 : 10 L. W 314: 53 IC 70, 28 O. C 387 : A. I. R 1925 O 359.

(3) 60 C 918 : 38 C. W. N 120 : A. I. R 1933 C 706.

(4) 47 B 28 : 24 Bom. L. R 507 : A. I.R 1922 B 209, 56 B 135: 34 Bom L R 143 : 137 I. C 545 : I. R 1932 B 275 : A. I. R 1932 B 259, A. I. R 1930 P. C. 260

ceedings must come to a termination before an action can be maintained, it will not lie on part only of the proceedings (1). The cause of action does not survive after the death of the person prosecuted, fot it is a personal injury and not injury to the estate so that his legal representatives cannot continue the suit which abates on the plaintiff's death (2).

Does not survive

Suit abates on plaintiff's death

In a personal action like a suit for damages for malicious prosecution, if, in the first Court, the result was a dismissal of the suit, the plaintiff in appealing against it, is only seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit. The appeal, therefore, partakes of the character of the suit, and the "right to sue" will not survive on the death of either party. The appeal cannot be continued even in respect of costs or other reliefs which are merely incidental to the main relief. The same principle applies to the dismissal of the suit in appeal and the second appeal would abate on the death of either party (3). It does not survive after the defendant's death, although in a Madras case the legal representatives were

Abatement of appeal.

(1) 9 C. W. N 736 (illegal arrest in the course of the proceedings).

(2) 31 C 406 : 8 C. W. N 329, 13 B 677, 4 Pat L. J 676 : 52 I. C 348, 44 M 357 ; 40 M. L. J 173 : 29 M. L. T 121 : 1921 M. W. N 121 : 14 L. W 200 : 62 I. C 260 : A. I. R 1921 M 1 F. B., 44 M 828 : 41 M. L. J 304 : 1921 M. W. N 438 : 13 L.W 705 : 62 I. C 757 : A.I.R 1921 M 405, 49 M 208 : 92 I.C 366 : A.I.R 1926 M 243. But see 31 C 993 : 8 C.W.N 745 contra. See O. 22, R. 1 C. P. C. See 'Malicious search'.

(3) 170 I. C 159 : A. I. R 1937 N 216.

allowed to prosecute a second appeal, after filing which the defendant had died (1).

Jurisdiction.

The defendant instituted criminal proceedings at place A against plaintiff who was residing at place B. Summons was served on plaintiff at B and as a result of the proceedings plaintiff sued the defendant to recover special and general damages for malicious prosecution. It was held that part of the cause of action arose at place B, and with leave under Cl. 12 of the Letters Patent the Court at B had jurisdiction to entertain the suit (2).

amages against Corporation.

An action for damages for malicious prosecution lies against a corporation (3). There is a right of action for false and malicious prosecution against a municipality where a prosecution under the Municipal Act instituted by its officers within the scope of their duty is actuated by the same kind of malice which is essential for the maintenance of an action for malicious prosecution (4). In fact a corporation would be liable for damages for malicious prosecution, if a like action against its agents or servants acting with authority or within the scope of their employment would lie if they had acted as principals (5). When a municipal corporation institutes a

he test.

(1) 26 M 499.
(2) 60 C 918 : 38 C. W. N 120 : A. I. R 1933 C 706.
(3) 56 B 135 supra, 1944 A.L.W 171, A.I.R 1934 L 907 (municipality).
(4) 37 Bom L. R 468 : 158 I. C 31 : A. I. R 1935 B 355.
(5) 42 C. W. N 1219 : A. I. R 1938 C 829.

prosecution without taking reasonable care to inform itself of facts with which it might have made itself acquainted, it amounts to prosecuting without reasonable and probable cause. And when coupled with longstanding enmity between the parties, it would be sufficient proof of malice (1).

CHAPTER IV

MALICIOUS SEARCH.

Malicious house search.

It cannot be said that there is no tort known as malicious house search. New invasions of rights may give rise to new classes of torts, and there can be an action for maliciously procuring a house search (2). So a person may sue for damages for malicious house search but in order to succeed he must prove that the defendant was responsible for the search of his house and the evidence adduced must not be capable of explanation on any other hypothesis (3). Thus a complaint of theft to a responsible authority must inevitably result in the search of the person accused of the offence and if malicious, would make it a case of malicious search and the complainant

What must be proved.

Search on complaint of theft.

(1) 1944 A. L. W 171.

(2) (1945) 2 M. L. J 461 : 58 L. W 613 : 1945 M. W. N 720 : 224 I. C 523 : A I R 1946 M 147.

(3) A. I. R 1924 Pat. 817.

When Police officer liable for search.

will be liable for damages (1). A police officer is authorised by law to search a house on suspicion, but he is liable for an illegal search i.e., if it is proved that he acted dishonestly and was prompted by a desire to injure the plaintiff (2). But a person who assists the police in the conduct of a search is not liable to damages if the search proves to be illegal (3). In a Patna case where as a result of information given by the defendants to the Police regarding the plaintiff's character, the Police searched the plaintiff's house and the plaintiff then brought a suit against the defendants for damages for malicious house search, it was held, (a) that such an action was entirely unknown to the law co nomine ; though an action for searching a house illegally may be maintained, but that would be one of an entirely different character ; (b) that if the plaintiff were to bring an action for malicious house search, it would be one against the Police who searched his house, that would not be however the same as one for malicious prosecution involving issues as to reasonable and probable cause ; (c) that even if brought against the Police, it would be an action in trespass, in which the plaintiff would have to prove not the lack of

Person who assists search not liable.

(1) 4 Pat. L. W 98 : (1917) Pat. 383 : 40 I. C 679.

(2) 27 B 590, 24 C 691.

(3) 42 M 446 : 36 M. L. J 252 : 25 M. L. T 274 : 1919 M. W. N 452 : 51 I. C 198 (a police officer outside his jurisdiction helping another police officer in a search is not liable, but he cannot carry on the search himself).

reasonable and probable cause, but acting by the Police in excess of their power under the law; (d) that an action against the defendants for the information given by them would be one for slander (1). Damages for malicious search are awarded on the same principles as for malicious prosecution. Right to damages for malicious search is likewise a personal right and on the death of the plaintiff the suit abates (2).

Suit abates on death

CHAPTER V

MALICIOUS ARREST.

False imprisonment and malicious arrest have sometimes been vaguely used as being interchangeable terms (3), but the two are essentially distinct (4). False imprisonment is the act of the defendant himself or of a merely ministerial officer put in motion by him, and he must answer for interfering with the liberty of another. Thus, where a man goes to the police and gets another arrested, he sets a ministerial officer in motion on his own initiative. It is a case of false imprisonment (5), and the man must justify his act in a suit for damages by the other who has suffered loss of liberty in consequence. Malicious arrest on the other hand arises out of process of court, and

False imprisonment

Malicious prosecution and false imprisonment.

(1) 19 Pat L. T 208.

(2) 31 M. L. J 772 : 20 M. L.T 303 : (1916) 2 M. W. N 280 : 38 I C 823. See. P. 235.

(3) cf. 60 C 955 : A. I. R 1933 C 708.

(4) See 57 C 25 : A. I. R 1930 C 392 (distinction discussed).

(5) 9 C. W. N 736, 43 C. W. N 1080.

mostly out of civil process (1). It is arrest or imprisonment by means of judicial process, whether civil or criminal, procured maliciously and without reasonable cause, that is, by abuse of legal process ; and the man will be protected in the absence of proof of abuse. The defendant had a decree for money against the plaintiff which had been partly paid, but he got the plaintiff arrested on a process of court issued for the full amount of the decree. It was a case of malicious arrest and the plaintiff was entitled to damages (2). In malicious arrest thus the imprisonment is effected by or in pursuance of the valid order or judgment of a Judge or Magistrate and there is no cause of action except on proof of malice and want of reasonable cause. In malicious arrest therefore the plaintiff must prove malice and want of reasonable cause, not so in false imprisonment where he need only prove that he was detained, that the detention was by the defendant or caused by him and that it was wrongful and the defendant must prove his justification (3). If the person sued is not the person who actually arrested the plaintiff the question is whether the defendant so acted as to render the plaintiff's arrest an act of himself. A private individual is responsible for an arrest by the police if he has either 'given the plaintiff into custody' 'directed' the constable to

nt of reason- cause and lice not essary

question ere the endant is not person who ually arrests.

(1) 60 C 955 : A. I. R 1933 C 708 supra.
(2) (1854) 3 E & B 929.

arrest,' or 'signed the charge sheet' with a view to his detention. A private individual is not to be held responsible for the supervening arrest on the ground that arrest was likely to follow from information given by him, unless although he has not expressly directed the arrest, he has in fact made it impossible for the constable to act otherwise (1).

Courts cannot regard any detention as proper unless the detention is in the strictest conformity with the provisions of the law, and substantial damages must be awarded in every case where a person has wrongfully deprived another of his liberty. The person detained necessarily suffers discomfort and inconvenience as a result of his loss of liberty. The plaintiff was arrested on 19-8-1942 under r. 129 (1) of the Defence of India Rules and detained in jail under r. 129 (2). The period of 15 days mentioned in the proviso (1) to r. 129 (2) expired at midnight on 2-9-1942 but the plaintiff was detained further without any order of the Provincial Government as required under the proviso. It was only in the evening of 5-9-42 that the Provincial Government passed an order for the detention of the plaintiff under r. 26 of the Defence of India Rules. The plaintiff sued the Provincial

Substantial damages to be awarded.

Detention by Government without strict compliance with law.

(1) 60 C 935 supra.

Government claiming Rs. 2000 as damages for wrongful imprisonment on the ground that his detention from midnight of 2-9-42 to evening of 5-9-42 was illegal and contrary to law. The Provincial Government admitted that the detention was illegal but pleaded that the order authorising the detention could not be obiained on account of pressure of work in the offices of the Home Department and of the District Magistrate and that only nominal damages could be awarded. The plaintiff stated that being a congressman of political views, the detention did not affect his reputation or cause humiliation or indignity but that by the wrongful diprivation of liberty he necessarily suffered discomfort and inconvenience. It was held, (a) that the principle of restitution in integrum had no application to the case of the plaintiff who was illegally detained and the plaintiff having alleged misconduct on the part of the defendant was entitled to damages at large ; (b) that in order to be entitled to exemplary damages, it must be shown that the conduct of the defendant was high-handed, insolent, vindictive or malicious, showing a contempt of the plaintiff's right or disregarding every principle which actuates the conduct of a gentleman ; (c) that the damages awarded should not be merely nominal but such as to remove any impression there might be that persons having authority could restrain

other persons in contravention of the law ; (d) that any wrongful deprivation of the liberty of a person in any case was a most serious affair; and it would be very dangerous to allow any impression to prevail that pressure of work or negligence could be any excuse for detaining a person without observing the law in the strictest manner ; and (e) that having regard to the status and position of the plaintiff and his political views and in consideration merely of the discomfort and inconvenience actually suffered by him Rs.1000 would be the proper amount to be awarded as damages (1).

Arrest by constables on suspicion.

L and C were two young men under 21 years of age. Both of them were window cleaners. The defendants were constables. One day C entered a telephone kiosk to receive a call and L stood waiting outside. The defendants came to the same kiosk and arrested L and C on suspicion and after sometime let them off. L and C thereupon brought a suit for damages for false imprisonment and the defence of the constables was that the plaintiffs were for a period of 25 minutes kept under observation by the defendants and that the defendants, having as a result of such observation reasonable and probable cause for suspecting that L and C were to commit theft from the coin box at the telephone kiosk arrested them and detained them until the completion of the

(1) I. L. R 1945 Kar 197 220 I. C 43 : A. I. R 1945 S 93.

enquiries. There was no allegation in the defence that either of the plaintiffs was a suspected person or that he was an idle and disorderly person. The Vagrancy Act, 1824, s. 4 provides that every suspected person or reputed thief frequenting any river, canal or navigable stream....or any street, highway....or any place of public resort....or any street, highway or place adjacent, with intent to commit felony apprehended by a constable or police officer shall be deemed to be a rogue and vagabond and therefore punishable as provided by the statute. S. 7 of the Penal Servitude Act 1891 extends s. 4, Vagrancy Act, 1824 to every suspected person or reputed thief loitering about or in any of the places mentioned in the 1824 Act. The Liverpool Corporation Act, 1921, provides that it shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant....(a) any loose, idle or disorderly person whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanour or breach of the peace or to instigate or abet any such breach; (b) any person whom he shall find between sunset and the hour of eight in the morning lying or loitering in any street, yard or other place and not giving a satisfactory account of himself'.

Construction of special powers given to constabl

It was held that the special powers given to constables under the Vagrancy Act are confined to a class of persons described as 'suspected persons or reputed thieves'. They can only be apprehended without warrant if they already are at the time of their arrest or imprisonment 'suspected persons or reputed thieves'. It does not mean that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant. Suspected person means a person who has acquired the character of a suspect and does not mean any person whom the apprehending constable suspects to be loitering with intent to commit a felony. So far as s.513 of the Liverpool Corporation Act is concerned it must be established that the person apprehended belongs to the class of loose, idle or disorderly persons. The power to apprehend does not arise where all that can be proved is that the constable honestly believed on reasonable grounds that the person apprehended was a loose, idle or disorderly person. 'Loitering' does not mean 'standing or waiting in the street' but it means loitering in such a way as to indicate that the person was idling in the street for some unlawful purpose (1). Section 186 of the Customs Consolidation Act (English) makes it an offence for any person to knowingly harbour, keep or conceal

Meaning of offender under the Customs Act.

(1) (1937) 1 K. B 232 : 106 L. J (K. B) 20 : 155 L. T 602.

any uncustomed goods and empowers the customs officer to detain an offender. Where a customs officer detained a ship's steward merely on suspicion that he was harbouring uncustomed goods, but not in fact guilty of the offence, it was held that the statute empowered only detention of 'offenders' not suspects and that the person detained was entitled to recover damages for false imprisonment (1). The Deputy Superintendent of Police of Madura instructed a Sub-Inspector of the Railway police on the phone to proceed to Kodaikanal Road Railway Station by the Trivandrum Express and there prevent the ex-Maharaja of Nabha boarding that train. On the journey from Madura to Kodaikanal Road the Sub-Inspector found that a compartment had been reserved in that train for the Maharani of Nabha. Believing that his instructions related to the Maharani, the Sub-Inspector on arrival at Kodaikanal Road prevented the Maharani and her minor daughter from boarding the train at the station and also directed two police constables to close the only gate through which the Maharani and her daughter could get out of the station which they did and they posted themselves at the gate with a view to prevent their egress. The Maharani filed a suit for damages for false imprisonment against the two

Maharani of a's case.

(1) (1940) 2 K. B 570 (C. A).

police officers and the two constables and also the Province of Madras as the police had acted in the course and as a part of their official employment. It was held that the state could not be liable for the improper conduct of public servants unless those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it; that the Deputy Superintendent was not legally liable; that the Sub-Inspector must have believed, however mistaken this belief was, that the Deputy Superintendent had instructed him to detain the plaintiffs and it was clear from his conduct that he also honestly thought that it was his duty to obey those instructions so that he was entitled to claim the benefit of s. 270 (1) of the Government of India Act and that the case of the constables also fell within that provision (1).

Restraint must be total.

The restraint must be total and not partial in any particular direction (2), but the restraint need not be the result of actual force and if an officer tells a person that he must go with him, it is sufficient(3). Where however an illegal arrest takes place in the course of criminal proceedings

No liability for mistakes of the court or its officers.

(1) 48 C. W. N (F. R) 85 : (1944) 1 M. L. J (F. C) 399 : 1944 M. W. N 301 : 57 L. W 410 : 10 B. R 632 : 213 I. C 293 : A. I. R 1944 F. C 41 (on appeal from I. L. R 1942 M 696 : (1942) 2 M. L. J 14 : 1942 M. W. N 602 : 5 F. L. J (H. C) 103 : 203 I. C 45 : A. I. R 1942 M 539).

(2) See the Indian Penal Code S. 340. Also 7 Q. B 742. Thus damages cannot be awarded to witnesses against whom warrants of arrest are wrongfully served, A I R 1934 L 170.

(3) See 2 M. I. A 504, 15 W. R 85, 9 C 341 : 13 C. L. R 185 : 9 I. A 152, 1868 A. H. C. R 409, 2 M. H. C. R 396, 19 B 485 (arrest under an expired warrant), 9 B 1 (arrest under warrant of Civil Court).

instituted by a complainant, he is not liable for the mistakes of the Court or any of its officers. That is to say, where the opinion and judgment of a judicial officer comes between the charge and imprisonment of the person charged, the complainant cannot be held liable for false imprisonment (1).

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And where detention is caused by the plaintiff refusing to pay a rightfully levied fee or toll, he is not entitled to sue for damages and it is immaterial whether or not his attention had been drawn to the defendant's notices in this behalf (2).

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ndant.

In false imprisonment the onus lies on the defendant to prove the existence of reasonable and probable cause as his justification, in as much as imprisonment unlike prosecution is a tort in itself (3). The common law of England relating to the right of arrest by a private individual does not apply in India, where the law on the subject is contained in section 59 of the Code of Criminal Procedure. It is incumbent upon the defendant in such a case to prove either (a) that he did not arrest or cause the arrest of the plaintiff, or (b) that the offence was cognizable and non-bailable and had been

of arrest
vate
ual.

(1) 9 C. W. N 736. Where a Sub-Inspector of Police closed the plaintiff's shop pending his prosecution and the Court, when applied to, postponed consideration of the matter till the disposal of the case, the Sub-Inspector having acted in good faith was not responsible for the loss caused by the closing of the shop. A. I. R 1929 N 334. See 14 C. W. N 96 : 10 C. L. J 226 : 3 I. C 12. But see 107 I. C 479 : A. I. R 1928 C 231.

(2) 14 C. W. N 410 : 5 I. C 842 P. C.

(3) 29 M 208.

committed in his presence, and if he succeeds in proving either of these propositions the plaintiff will fail and it would be immaterial whether the defendant had or had not reasonable and probable cause for acting as he did (1). A case for wrongful arrest and one for malicious prosecution do not stand on the same footing for the purpose of disposal on the merits. An arrest is prima facie wrongful and requires to be justified by the defendant. As for malicious prosecution, any one is prima facie entitled to set a court of justice in motion, and consequently the person complaining of such action must prove affirmatively the non-existence of any reasonable and probable cause for it (2).

Wrongful arrest and malicious prosecution differentiated.

Damages for false imprisonment are awarded upon the same principles as for malicious prosecution. Not vindictive but substantial damages are awarded for wrongful detention and insult by railway servants for refusal to pay excess fare (3).

Damages for false imprisonment.

It is open to a litigant to take the view that where the decree is silent as to the manner of execution, he may reasonably attempt to excute it by proceeding against the person or the personal property of the judgment-debtor and if he does so, however maliciously, he cannot be said to be actuated

Arrest under civil process.

(1) 52 C 615 : 89 I. C 612 : A. I. R 1925 C 884. See 60 C 955 supra (it is doubtful if S. 59 is the only defence to a private person who has been responsible for the arrest of another by the police).

(2) 77 C. L. J 93 : 212 I C 421 : A. I. R 1944 C 4.

(3) 79 I. C 245 : A. I R 1923 B 172

by any unreasonable or improper conduct so as to found a suit for malicious arrest (1). But although a decree-holder or an assignee-decree-holder has every right to put the law in motion to execute the decree and recover the amount thereof in ways open to him under the law, if he oversteps the bound prescribed by the law, he cannot escape liability for damages. The law not only protects a person and his property but also protects him from damage to his person, property and reputation caused by the unlawful setting of the law in motion against him.

ıility for wfully ng the law ıotion.

Where, therefore, an assignee decree-holder, before getting his assignment recognised by the Court, applies for arrest of the judgment-debtor on false allegation without reasonable and probable cause and obtains an arrest warrant against him on false pretences and by practising fraud upon the Court, he must be held to be liable in damages to the person against whom the arrest warrant is obtained. The fact that the person is not actually arrested is immaterial. The act of the assignee decree-holder in obtaining the order for arrest on false pretences can only be due to malice and not in the exercise of his rights as a creditor, and having maliciously and un-

ıstration.

ıal arrest necessary.

(1) 20 Pat. L. T 367: 179 I. C 790: A. I. R 1939 P 13 (S. 95 C. P. C gives right to a party to claim compensation in certain circumstances, but there is no provision in the code for a situation resulting from the execution of decrees against the person or property of the judgment-debtor for the obvious reason that the terms of the decree under execution itself must decide the rights of the parties), 1938 P. W. N 783.

reasonably set the law in motion he cannot absolve himself from liability by pleading that the Court was responsible for issuing the warrant of arrest when it should not have issued it (1). Where the plaintiff brought a suit for damages on the ground that the defendant, who had an unsatisfied judgment against him, applied under O. 21, R. 30 for an exparte order of arrest on a false allegation that the plaintiff was about to leave the jurisdiction, the requirements of the law were satisfied by the plaintiff showing that it was the invariable practice of the Court only to make an order of that kind when special circumstances are alleged and that the defendant had alleged such circumstances maliciously and without reasonable and probable cause. It is not necessary for the plaintiff to show that the order was wholly wrong or without jurisdiction, or that the proceedings terminated in his favour. Such a suit is in substance an action for damages for abuse of process analogous to an action for malicious prosecution and the plea that the defendant had only required a judicial officer to exercise his discretion is of no avail (2). Similarly, where a person is arrested under a civil process, if the decree-holder has obtained such process fradulently or improperly it will be a case of malicious arrest

Exparte order of arrest on false allegation

Arrest under process obtained fraudulently or improperly.

(1) 51 Mys H. C. R. 460.

(2) 36 C.W.N 809 : 56 C. L. J 29 : 139 I. C 438 : I. R 1932 C 618 : A. I R 1932 C 847.

for which he will be liable in damages to the person arrested (1).

No liability if all facts placed before court.

He will however not be liable if he has placed all the facts before the Judge who in consideration of such facts uses his discretion and orders the arrest (2).

Arrest under valid judgment though erroneous

Where the plaintiff was arrested in pursuance of a valid judgment though erroneous, the defendants were not liable, but the case would be different if the judgment was invalid for want of jurisdiction or other causes (3).

Arrest under invalid judgment.

Illustration.

Where a decree for money was passed against the estate of a deceased person in the hands of his heirs, and on an application being made to execute the decree, the Court passed a wrong order for the arrest of the heir, who was accordingiy arested, the heir was entitled to damages for wrongful arrest (4).

Arrest of legal practitioner while attending court.

A legal practitioner is exempt from arrest under civil process while attending a Court in connection with any matter pending before it, but such arrest would not entitle him to claim damages.

Warrants of arrest against witness.

To claim damages it is essential that the arrest was procured maliciously and without reasonable and probable cause (5). Damages cannot be awarded to witnesses

(1) 16 C W. N 540 : 14 C. L. J 515 : 11 I. C 729, 8 M. H. C. R 38.

(2) 29 M 208, 25 Bom. L. R 595 : A. I. R 1924 B 191. See also 1. C. W. N 510 ibid.

(3) 25 Bom L. R. 595 : A. I. R 1924 B 191.

(4) 48 B 691 : 26 Bom. L. R 349 : 87 I. C 109 : A. I. R 1925 B 118. But see 25 Bom. L. R 595 : A. I. R 1924 B 191 where a contrary opinion was expressed.

(5) 7 R 598

against whom warants of arrest are wrongfully served (1).

Damages for arrest under civil process

The damage in case of malicious arrest under civil process must be some wrong suffered other than what might have been compensated for by awarding costs in the suit (2). Where a person brings a claim for damages for wrongful arrest before judgment, the Court may award general damages although no proof of any special damage is forthcoming (3).

CHAPTER VI

MALICIOUS CIVIL PROCEEDINGS.

Suit for damages for civil proceedings.

As a general rule (as noted in p. 173-175), it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even though malice is provable. There are, however, recognised exceptions to this rule (4), and an action for malicious prosecution may lie even where the proceedings are civil and not criminal, though it is the malicious preferring of an unreasonable criminal charge that is the usual foundation for the form of action ordinarily understood by the familiar title of an action for malicious prosecution (5). It is an action analogous

(1) A. I. R 1934 L 170
(2) 4 C 583, 35 M 598. See 16 C. W. N 540 supra, 53 C 1008.
(3) 24 L W 252 : 97 I. C 684 : A. I. R 1925 M 962.
(4) I.L.R. 1946 Kar 391.
(5) I L R 1945 B 547 : 47 Bom L R 304 : A. I. R 1945 B 320.

to malicious prosecution which lies for maliciously and without reasonable and probable cause instituting certain forms of civil proceedings against another. They are, generally speaking, proceedings which tend to cause injury at any rate to credit, fair name and reputation immediately that they are instituted. They are described compendiously as malicious abuse of civil proceedings (1). These are proceedings for bankruptcy, liquidation, arrest and execution against property, instituted maliciously and without reasonable and probable cause (2).

Bankruptcy, liquidation, and execution proceedings.

I

MALICIOUS BANKRUPTCY PROCEEDINGS.

Damages for malicious insolvency petition.

A suit for damages will lie against a person who maliciously and without reasonable cause petitions to have another person adjudicated a bankrupt (3). Where on the application of the defendant, the plaintiffs were adjudged insolvents and the receiver took possession of their property, but the adjudication was annulled on appeal by the plaintiffs and it was also found that the application for adjudication was made

(1) 1945 A L J 462.
(2) I L R 1946 Kar 391.
(3) (1871) L. R 6 Ex 329.

maliciously and without reasonable and probable cause, a suit by the plaintiffs for damages against the defendant was maintainable. On principle in a matter like this there can be no distinction between a trader and a non-trader for each of of such persons has a credit and a reputation at stake (1). In a suit for damages as the result of malicious insolvency proceedings instituted by the defendant, the plaintiff, in order to succeed, must prove that the defendant in presenting the petition was actuated by malice and that there was no reasonable and probable cause for the institution of the insolvency proceedings. Malice alone is not sufficient, there must be both malice and absence of reasonable and probable cause (2). The dismissal of the insolvency proceedings is part of the cause of action for a suit for damages. Injury to credit and reputation is also a part of the cause of action, and so the court within whose jurisdiction the dismissal takes place or damage is suffered has jurisdiction to try a suit for damages for maliciously filing a petition in insolvency (3).

Both malice and reasonable cause to be proved.

Court in which suit lies.

(1) 1945 A L J 462.
(2) 161 I. C 617 : A. I. R 1936 R 7.
(3) 159 I. C 142 : A. I. R 1935 R 367.

II

MALICIOUS LIQUIDATION PROCEEDINGS

A malicious and groundless attempt to have a company wound up as insolvent, is likewise an actionable tort (1).

III

MALICIOUS CIVIL PROCEEDINGS.

No damages for civil action.

When damages may be claimed-the test.

False defence.

No suit, we have seen (P. 173), lies for damages against a person who institutes a civil action against another maliciously and without reasonable and probable cause —he is sufficiently indemnified by costs. So as a general rule a civil action, though false and malicious, will not give rise to an action for damages (2). The test to be applied is whether the civil action complained of necessarily or naturally involved damage which could not be compensated by costs. If the action necessarily or naturally involved such damage and was instituted falsely and maliciously, a suit for damages is maintainable (3). So an agreement to make a false defence in a civil suit is not an actionable wrong (4), and it is neither an actionable wrong to wrongfully intervene

(1) (1883) 11 Q. B. D 674.
(2) I. L. R 1946 Kar 391, 148 I.C. 895 : A.I. R 1934 R 75.
(3) 6 R. R 261 : 148 I. C 895 : A. I. R 1934 R 75.
(4) 41 I. C 522.

Claim petition.

with a claim petition in execution proceedings (1). Where a person having bonafide rights gives notice to others who are likely to be affected by such rights, he cannot be proceeded against without clear proof of malice (2). No action for damages will lie against any person for issuing execution or otherwise acting in pursuance of a valid judgment or order of a Court of justice even though it is erroneous and even though it is therefore afterwards reversed or set aside for error (3). But it is a tort to wrongfully obtain a process of execution, or an interlocutory process in a suit (4), for a person interfered with in the lawful enjoyment of his own property is entitled to rid himself of the unlawful interference and to hold the wrongdoer liable in damages (5). Thus where the defendant instituted a suit against the plaintiff maliciously and without reasonable and probable cause and obtained a temporary injunction in consequence of which the plaintiff sustained damages in his trade, a suit for damages against the defendant is maintainable and is not barred by section 95 of the Code

Notice.

Execution of decree or order of court.

Process of execution wrongfully obtained.

Temporary injunction in malicious suit.

(1) 7 S. L. R 104 : 24 I. C 261.

(2) 3 R 295 : 90 I. C 907 : A. I. R 1925 R 369.

(3) I.L.R 1946 Kar 391.

(4) 7 S L R 104 supra. Termination of the proceedings in favour of the plaintiff is essential except where the defendant has dropped the proceedings, 45 M 527 : 30 M. L. T 269 : 1922 M. W. N 242 : 15 L.W 422 : 66 I. C 700 : A. I R 1922 M 206.

(5) 40 C 598 : 17 C. W. N 541 : 17 C. L. J 478 : 15 Bom. L. R 472 : 11 A. L. J 413 : 40 I. A 56 : 25 M. L. J 104 : 13 M. L. T 406 : 1913 M. W. N 406 : 184 P. L. R 1913 : 18 I. C 919 P. C.

Temporary injunction on insufficient grounds.

Attachment before judgment.

of Civil Procedure (1); and a suit lies irrespective of the merits of the case where the temporary injunction was obtained wrongfully and on insufficient grounds causing loss to the plaintiff (2). An attachment before judgment obtained without reasonable and probable cause and therefore maliciously would give rise to a claim for damages (3). Actual possession of the property and its deprivation must be proved (4), so that a mere application for attachment before judgment does not give rise to a cause of action for damages for malicious attachment (5); and also malice and want of reasonable and probable cause for the seizure must be proved (6).

(1) 30 C. W. N 465 : 94 I C 444 : A I R 1926 C 757 (on appeal 46 C. L. J 455 : 106 I. C 277 : A. I. R 1928 C 1), 51 M 642 : 54 M. L. J 647 : 27 L. W 457 : 109 I. C 414 : A I R 1928 M 679, 1943 A. L. W 601 See P 171.

(2) 53 C 1008 : 100 I. C 318 : A. I. R 1927 C 247, 16 C. L. J 34 : 40 I. C 443, 42 C 550 : 18 C. W. N 1189 : 21 C. L. J 68 : 26 I. C 296, 45 P. L. R 1922 : A. I. R 1922 L 303.

(3) 45 M 527 : 30 M. L. T 269 : 1922 M. W. N 242 : 15 L. W 142 : A. I. R 1922 M 206.

(4) 38 A 676 : 14 A. L. J 728 : 35 I. C 86, 7 C. W. N 520 (wrongful seizure and loss to plaintiff in consequence must be proved). So that no action lies if the wrongful attachment has not taken place owing to the plaintiff furnishing security, 39 M 952 : 30 M. L. J 180 : (1916) M. W. N 156 : 3 L. W 82 : 32 I. C 448. A payment made to prevent a wrongful attachment of property is one made under coercion and can be recovered back,—the owner in such a case need not prefer a claim under O. 21, R. 58,—40 C 598 supra.

(5) 39 M 952 *ibid*. If the attachment is done recklessly and without sufficient or reasonable cause an action will lie, 13 W. R 3.

(6) 54 I. C 827, 6 Bom. L. R 704, 2 N. W 353, 35 M 598 infra, 21 P. L. R 1920. See 32 M 170 : 18 M. L. J 490 : 4 M. L. T 303 : 2 I. C 345. Malice is not necessary where the property of a stranger is attached, 17 C 436 : 17 I. A 17. If such property is sold the stranger may follow it into the hands of the purchaser who has purchased at his risk, 14 W. R 120 : 5 B.L.R Ap. 71. See 3 B 74, 8 A.L.J 92 : 9 I.C 317. The Civil Procedure Code also provides a summary remedy for abuse of process in S. 95, so that a person aggrieved either may, instead of bringing a suit, avail himself of that remedy which is optional, 35 M 598 : 21 M. L. J 1052 : 10 M.L.T 365 : (1911) 2 M. W. N 414 : 12 I. C 507. See 21 W.R 375, 11 W.R 143, 32 M 170 : 18 M.L.J 490 : 4 M.L. T303 : 2 I. C 345.

What plaintiff must prove,

As in a suit for damages for malicious prosecution, a plaintiff in an action for damages for abuse of civil proceedings, e.g. wrongful distress, must, in order to succeed prove that the proceedings were instituted by the defendant, that the defendant acted without reasonable and probable cause, that the defendant also acted maliciously, and in certain classes of cases, that the proceedings have come to a proper or legal end, i.e. terminated in the plaintiff's favour, unless the proceedings are incapable of so terminating. There is, however, no cause of action in respect of doing a legal act, even if it is done with malice and without reasonable and probable cause (1).

Acts done with and without judicial sanction.

A distinction besides must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ of warrant which authorised the seizure, the seizure is lawful and no action will lie in respect of the seizure. If however the writ of warrant did not authorise the seizure of those goods, an action will lie for damages occasioned by the wrongful seizure without proof of malice (2). The

(1) I. L. R 1941 B 521 : 43 Bom. L. R 546 : 196 I. C 385 : A. I. R 1941 B 286. According to an Allahabad case in order to entitle one to damages for a wrongful attachment, it is not necessary to prove malice and the absence of reasonable and probable cause, 1938 A.L.R 973 : 1938 A. W. R 447 : 1938 A L J 654 : 177 I. C 668 : A I R 1938 A 508. See also 17 L 668 : A I R 1936 L 524.

(2) 1931 A. L. J 541 : 61 M. L. J 330 : 33 L. W 513 : 14 O. L. J 334 : 8 O. W. N 325 : 1931 A. C 77 : 130 I. C 310 : I. R 1931 P. C 54 : A. I. R 1931 P. C 28.

Property of stranger attached in execution.

reason is that an owner of a property has a right against all the world to possess it and that legal right is violated by attaching the property (1). So if a decree-holder in execution of his decree attaches a property belonging to a stranger, the attachment is wrongful and the owner is entitled to recover damages from the decree-holder without proving either absence of reasonable and probable cause or malice (2). Thus where a person's property is wrongfully attached for revenue due from another, the act being prima facie wrongful no malice need be proved (3). It is likewise an actionable wrong to attach a debtor's property after the judgment-debt has been paid (4). Where goods are wrongfully seized by the Official Receiver at the instance of a creditor and the wrongful act is not protected by any judicial order of the Insolvency Court, both the Receiver and the creditor are liable for damages in a suit by the owner of the goods so seized (5). A suit therefore lies for damages for illegal attachment, a mistake being the cause, or the presence or absence of reasonable and probable cause being immaterial (6), and if while under such attachment the property

ttachment after tisfaction of ıcree.

(1) 1947 N. L. J 446.

(2) 1947 N. L. J 446 ibid.

(3) 1912 M. W. N 42 : 13 I. C 799. See 8 N. L. J 170 : 94 I. C 573 : A. I. R 1925 N 390.

(4) 16 C. W. N 540 : 14 C. L. J 515 : 11 I. C 729.

(5) 1942 A. L. W 599.

(5) 16 C.W.N 540 : 14 C.L. L. J 515 : 11 I.C 729.

Removal of property under attachment.

is removed by a third party, the person attaching would never-the-less be liable in damages to the owner of the property (1).

Damage to property under attachment.

So also a creditor who wrongfully attaches the property of another would be liable to damages for any injury or depreciation caused thereby to the property attached (2) even though he has acted honestly, i. e., innocently, mistakenly or inadvertently(3).

Suit for damages by successful claimant.

So in a suit for damages by a successful claimant for wrongful attachment of his goods the decree-holder cannot contend that he had reasonable grounds for believing that the goods attached in execution of his decree belonged to his judgment-debtor and that damages cannot be given unless and until the claimant proves absence of reasonable and probable cause and malice. It is not also open to the decree-holder to raise the plea that his judgment-debtor is the owner of the goods if he has not filed a suit for a declaration under O. 21, R,63 Civil Procedure Code, as the order of the executing Court that the goods are the property of the claimant is conclusive subject to result

(1) 51 I. C 191. See 4 Bur. L. T 178 : 11 I. C 828.

(2) 41 A 658 : 17 A. L. J 856 : 1 U. P. L. R (H.C) 115 : 54 I. C 792, 6 I. C 789, 17 C 436 : 17 I. A 17, 23 M. L. J 255 : 12 M. L. T 383 : 1912 M. W. N 899 : 17 I. C 220, 32 C. L. J 230 : 60 I. C 280, 13 W. R 3 (attachment before judgment, recklessly, carelessly and without sufficient or reasonable cause). See 31 C.L. J 495 : 57 I. C 375 F. B.

(3) 12 W. R 329 : 3 B. L. R 413, 11 W. R 120 : 5 B. L. R Ap. 71 (decree-holder and auction-purchaser both held liable), 3 B 74, 8 Bom H. C. R 177, 112 I.C 848 : I.D (1929) L 87 : A.I.R 1929 L 200, 93 I. C 443 : A. I. R 1926 O 483, 8 N. L. J 170 : 94 I. C 573 : A. I. R 1925 N 390. See 11 Bom. H. C 46.

enosis of decree-olders' liability.

of such a suit (1). The decree-holder is liable when the attachment is found to be illegal. His liability arises because it was he who got the property attached and he was bound to restore it in the condition in which it was when it was attached (2).

o liability where facts placed fore court.

If however the decree-holder has placed all the facts bonafide before the Court which thereupon orders attachment he is

or for court's stake.

not liable (3), and he is neither liable for any mistake or misconduct of the officer making the attachment, unless he or his agent had intervened and directed the ac-

istration.

tion of the officer (4). The defendant held a decree against the plaintiff and applied for execution of the decree by attachment of the moveable properties of the plaintiff. The execution petition was put up for orders before the Judge in chambers and an order was made for the arrest of the plaintiff in chamber where neither the defendant nor his counsel was present. But by mistake of the Court officials a warrant of attachment was issued and the amin who went to execute it took the defendant (decree-holder) with him and proceeded to a printing press of the plaintiff. As it was late in the day and nothing could be done, the amin locked up the press and sealed it

(1) 1939 Rang. L. R 690 : 186 I. C 879 : A I R 1940 R 43

(2) 193 I. C 654 : 1941 O. L. R 313 : 1941 A. W. R (c.c) 136 : 1941 O. A 367.

(3) 12 W. R 329 (per Norman J). See also 7 W. R 355, 9 W. R 133, 18 W. R 440, 14 C. W. N 96 : 10 C. L. J 226 : 3 I. C 12. See P. 252.

(4) 24 W. R 439

with the seal of the defendant and went away. The press remained locked for three or four days and was opened by orders of court only after the plaintiff (judgment-debtor) had deposited the decree amount in Court. The plaintiff then brought a suit for damages against the defendant alleging that the defendant was liable for malicious prosecution and trespass on property and also for abuse of process of Court. It was held that the plaintiff in order to succeed should prove that inspite of the order for arrest or after knowing that the order was only for arrest the defendant deliberately got a warrant of attachment by misleading or influencing the officers concerned and that he instigated the amin to lock up the press ; that on evidence on record the defendant was neither responsible for the wrong issue of a warrant of attachment instead of a warrant of arrest, nor was he in any way instrumental in getting the press locked ; that the error was wholly and entirely on the part of the officers of the Court for which the defendant was not responsible ; that there could be no question of ratification by the defendant of the act of the amin, and that therefore the defendant could not be held liable for damages(1).

No liability for erroneous decision of Court.

A party is not either liable in damages for procuring an erroneous decision of a Court. For a Court is always expected

(1) 46 Mys. H. C. R 175 : 19 Mys. L. J. 69.

to observe the limits of its own jurisdiction and decide correctly on the facts and law. It is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the Court commits. An erroneous decision of Court (even if without jurisdiction) not obtained by any fraud practised on the Court does not therefore amount to an abuse of legal process and the party benefitted by the decision is not liable for damages accruing therefrom to the other party (1).

g attach-
to enforce
ance of
ss.

Thus a person who asks the court to attach certain property as the property of a witness under O. 16. R. 10 Civil Procedure Code cannot be placed on the same footing as a decree-holder who moves the court to attach certain properties as the properties of the judgment-debtor, because the proceedings to enforce the attendance of a witness are the act of the court. The same legal consequences cannot therefore follow if the property attached happens to be not of the witness but of another. A party therefore who moves the court under O. 16, R. 10, Civil Procedure Code and gets attached wrongly and carelessly properties of some other person as the properties of the witness, cannot be held liable for damages in a suit by the owner of the properties, especially when the party is not

(1) 9 I. C 137, 14 C. W. N 96 : 10 C. L. J 226 : 3 I. C 12, 25 Bom. L. R 595. See 6 M 426, 42 C 550 [illegible]

shown to have acted maliciously (1). Where for non-payment of arrears of municipal tax due in respect of a house the owner is prosecuted and convicted, and a warrant is issued to attach the moveables found in the premises concerned in accordance with statutory provisions and the warrant is executed by the attachment of the moveables of another person who at that time occupies the premises, the person whose moveables are attached cannot maintain a suit against the municipality or against the persons executing the warrant, for damages for wrongful attachment on the ground merely that the articles are his (2). There is similarly no liability for damages for procuring from a magistrate an erroneous order of attachment under s. 145 Criminal Procedure Code (3); and it is neither an actionable tort or wrong to obtain a permanent injunction in a suit from a Court (4). A party aggrieved by an order for costs under an erroneous decision in execution proceedings would however be allowed to recover the sum so paid as damages (5). And where a judgment-creditor is obstructed by a third person in executing his decree by attachment of his judgment-debtor's property, he is entitled to recover from that

Wrong attachment for municipal tax.

Wrong attachment order under s. 145 Criminal Procedure Code.

Permanent injunction in suit.

Wrong order for costs in execution.

Third person obstructing decree-holder.

(1) 46 L. W 266 : 1937 M. W. N 918 : A. I. R 1937 M 811.

(2) 55 L. W 68 : (1942) 1 M L J 267 : 205 I. C 276 : A. I. R 1942 M 311.

(3) See 1937 M. W. N 403 : 45 L. W. 555 : (1937) 1 M. L. J 611 : 169 I. C. 735 : A. I. R 1937 M 647.

(4) I.L.R 1946 Kar 391.

(5) 7 O. L. J 310 : 55 I. C 657.

Wrongful appointment of receiver.

person damages arising from his act (1). But in the absence of proof of malice no suit will lie for damages for wrongfully obtaining the appointment of a receiver (2).

Damages.

The plaintiff can claim both the value of the property and compensation for wrongful attachment(3). But the plaintiff cannot in a suit for damages for wrongful attachment be entitled to damages on account of any loss which arose not out of the original act of wrongful attachment, but out of something entirely independent (4). So that in a suit for damages for wrongful attachment, the cost of the legal proceedings taken to establish the right to the property attached cannot be recovered. Nor can damages be recovered for personal worry. Every one who is forced to take legal proceedings to establish his rights is subject to personal worry, but this is not a ground for awarding compensation (5). A person whose goods have been attached, and who in a suit under 0.21 R 63 has succeeded in getting a declaration that the goods be released from attachment, in order to be entitled to the full indemnity for the wrongful attachment, he is not bound to allege

No damages for loss not due to attachment.

Not for personal worry.

Damage where suit under O. 21, R. 63 is successful.

(1) 14 Bom. L. R 356 : 15 I. C 541.

(2) 12 Bur. L. T 239 : 56 I. C 960.

(3) 33 A 306 : 8 A. L. J 92 : 9 I. C 317, 3 B 74, 17 C 436 : 17 I. A 17, 8 A. L. J 92 : 9 I. C 317, 13 W. R 3. See 10 M. I. A 563 : 1 Ind. Jur. N. S 269 : 5 W. R. P. C 91. If the property is sold the plaintiff may sue either for restoration or for damage, 9 W. R 118.

(4) 1938 A L R 773 : 1938 A. W. R (H. C) 447 : 1938 A. L. J 654 : 177 I. C 668 : A. I. R 1938 A 508.

(5) 40 P. L. R 158 : A. I. R 1938 L 334

and prove that the defendant had resisted his objection maliciously or without probable cause. If the goods have been sold under the Court's order, the difference in the market value of the goods at the time of their attachment and the price fetched by the sale, the selling price having fallen intermediately, must be added to the damage. Such person need not prove his ownership to the property. It is sufficient if he proves that such property was in his custody because possession is always good as against the wrongdoer (1). In case of injuria sine damnum nominal damages are usually awarded and this principle is applicable to cases of trespass on immoveable property when there has been unjustifiable intrusion on property in possession of another, but this rule cannot be extended to every case of attachment of property irrespective of the circumstances. Thus, where an attachment of some properties made bonafide and on sufficient grounds was withdrawn at the creditor's own request at a very early stage of the proceedings, without any interference with the possession of the person aggrieved by the atachment, it was held that the principle of injuria sine damnum did not apply to such a case and even nominal damages could not be awarded to the person aggrieved by the wrongful attachment. It was

Injuria sine damnum.

(1) 17 L 668 : A. I. R 1936 L 524.

also held that the attachment in the above circumstancess was at best only a slander of the title and special damage must be proved before damages were awarded to the person aggrieved by the attachment (1).

Cause of action.

The cause of action accrues on the date of the wrongful attachment and the right to relief cannot be affected by any subsequent occurrence for which the plaintiff is not responsible (2). In order to give rise to a cause of action for damages for wrongful attachment of properties before judgment, it is necessary that the attachment should first be withdrawn in favour of the plaintiff. Certain properties of the plaintiff were attached before judgment and the plaintiff in order to release the property paid the necessary money into Court. The plaintiff contested the suit and applied for having the attachment vacated but no order was passed vacating the attachment. The suit was decreed against the plaintiff and the decree was satisfied out of the money deposited by the plaintiff. Thereupon the plaintiff brought a suit for damages for wrongful attachment. The plaintiff had no cause of action (3).

In a suit for damages for wrongful

(1) I. L. R 1940 L 191 : 42 P. L. R 720 : 186 I.C 646 ; A. I. R. 1940 L 21.

(2) 33 A 306 supra, 6 I. C 789. The cause of action for a suit for compensation for illegal distraint arises on the date of the actual loss or damage, or at least when the plaintiff comes to know of such loss, A. I. R 1922 A 139.

(3) 36 C. W. N 447 (35 C. L. J 480, L. R 10 A. C 210, 217 referred to.)

seizure, the onus lies on the defendant to prove that the seizure was lawful (1). *Onus.*

In a suit for damages for wrongful attachment time runs from the date of attachment (2), and the limitation is one year from that date (3). See Art. 29 of the Limitation Act. 1908. **Limitation.**

(1) 41 I. C 241.
(2) 3 B 74, 7 B 427.
(3) 23 M 621. *See also* 4 A 146, 31 M 431.

INDEX

DEFAMATION

MALICIOUS PROSECUTION